LOUISIANA LANDLORD-TENANT LAW

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Foreword

This revision adds several new features or sections to the Louisiana Landlord-Tenant Law chapter of the Desk Manual:

-- Quick checklist on how to assess an eviction case
-- Quick reference guide to most common eviction defenses
-- Primer on housing discrimination laws
-- Internet research sites for housing law

Please feel free to contribute to the continuing revision of the Landlord-Tenant chapter by sending case developments and suggestions for improving the chapter to Mark Moreau, mamoreau@nolac.org.

About The Author

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INTRODUCTION

This manual provides a brief discussion of Louisiana landlord-tenant law issues that commonly arise in the representation of indigent tenants. The subjects covered in this manual include:

-- Sources of Landlord-Tenant Law
-- Eviction Defenses
-- Lockouts & Utility Terminations
-- Tenant's Lease Cancellation Rights
-- Repairs
-- Tenant Damage Claims
-- Housing Discrimination Remedies
-- Security Deposits
-- Internet Research
-- Other Treatises

The section on Eviction Defenses includes a checklist on how to assess an eviction case and a quick reference guide to the most common eviction defenses. A more detailed discussion of eviction procedures and defenses follows the checklist and quick reference guide.

SOURCES OF LANDLORD-TENANT LAW

One of the first steps in analyzing a client's housing problems is to determine whether he has a landlord-tenant relationship with the adverse party.1 A land-lord-tenant relationship exists when there is a lease between the parties. A lease is an oral or written contract by which one party consents to give the other party enjoyment of a thing at a fixed price. La. Civ. Code arts. 2677, 2669-70. The legal relationship between the landlord and tenant is a mixture of contractual obligations and statutory duties. Generally, the lease is the law between the landlord and tenant unless it affects others' rights or is contrary to the public good. Carriere v. Bank of Louisiana, 702 So.2d 648 (La. 1996). Accordingly, each relevant provision in the lease must be analyzed to determine its proper interpretation and applicability. La. Civ. Code arts. 1983, 2045-57. Some notable principles of lease analysis are:

-- Uncertain or ambiguous lease provisions must be construed against the landlord and in favor of maintenance of the lease. New Orleans Minority Business Center, Ltd. v. Duong, 703 So.2d 157 (La. App.4th Cir. 1997).
-- Oral modifications of written leases may be valid. Quigley v. T.L. James & Co., 595 So.2d 1235 (La. App. 5th Cir. 1992); Gravier v. Satellite Business Systems, 519 So.2d 180 (La. App. 4th Cir. 1987).
-- If the lease does not govern a particular problem, then Louisiana Civil Code arts. 2668-2744 or other applicable laws will govern.
-- The lease provision may be modified or superseded by some other legal requirement, e.g. state or federal statute, regulation, local ordinance, or other agreement.

HOW TO ASSESS AND DEFEND EVICTIONS: A CHECKLIST

1. Ascertain client's objective--more time or defeat eviction?

- Explain possible eviction dates and state court eviction process
- Advise on possible defenses

2. What stage is the eviction at?
-- Pre-lawsuit
-- Pre-judgment
-- Post-judgment

_3. If post-judgment, does client have time and grounds for appeal, motion for new trial or petition for nullity of judgment? Most common grounds for petition for nullity are:

-- No notice of eviction received
-- Landlord accepted rent, but proceeded with eviction
-- Eviction was for ''no cause'' and lease or law only allows eviction for cause

Petitions for nullity of judgment can be filed within the eviction lawsuit. They are ordinary proceedings. Therefore, you must immediately apply for a temporary restraining order and preliminary injunction to stop the eviction.

4. If no judgment yet, explore possible settlement with landlord.

-- Assess whether pre-trial negotiations are consistent with defense strategies and client objectives.
-- What is the landlord's price (rent, costs) for dismissal of eviction?
-- If eviction is for ''n-- cause'', will landlord agree to extension of move-out date and under what conditions?
-- Landlord's fears about vitiation of eviction can be allayed by entering consent judgment with extended executory date.
-- Compromise agreements should be in writing or recited and recorded in open court t-- be enforceable. La. Civ. Code art. 3071.

5. Analyze client's defenses and remedies:

-- Is there a landlord-tenant relationship?
-- Does plaintiff have the right t-- evict by summary process?
-- Any leases or other agreements that govern the eviction?
-- If subsidized housing, what federal laws govern the eviction?
-- Procedural defenses?
-- Substantive defenses?
-- Affirmative lawsuits, e.g., housing discrimination or bankruptcy, to stop the eviction?
-- If housing discrimination exists (look for failure to accommodate disabled tenants or evictions based on association with minorities or children), file suit in state or federal district court and secure injunction or lis pendens bar.
-- Damage claims? They do not defeat evictions, but may provide settlement leverage

6. Prepare for Trial

-- Select all defenses to be pleaded.
-- Identify evidence (witnesses and documents) needed for trial.
-- Subpoena evidence needed for proof of defenses.
-- Apply for continuances if evidence cannot be timely produced for trial
-- Draft pauper affidavits and verified answer and exceptions(sworn to by client before notary) that specially plead affirmative defense(s) entitling tenant to retain possession. La. C.C.P. art. 4735.
-- Generally, judicial control doctrine should be pleaded, if applicable, since it is indisputably an affirmative defense.
-- File verified answer with clerk of court prior to trial.

7. Prepare for Appeal in Advance_

-- Preliminarily assess merits of appeal if eviction ordered
-- Discuss requirements for appeal with client
-- Prepare motion for appeal and appeal bond

8. Trial

-- Ask court to transcribe testimony in parish or city court eviction
-- Try exceptions before merits
-- Insist on dismissal if notice t-- vacate defective or if rent has been

accepted
-- Limit landlord's case to grounds raised in rule for possession
-- Present evidence necessary to support your defenses
-- Preserve grounds for appeal

9. Appeal

-- File suspensive appeal motion and bond with trial court within 24 hours of judgment
-- Ask for alternative bond (payment of rent into court registry) if tenant does not have surety.
-- Advise client of need t0 timely pay rent to- court registry or landlord during pendency of appeal
-- Make sure that estimated costs of appeal are timely paid if client is not proceeding in forma pauperis
-- If appeal is trial de novo to parish or district court, file petition for appeal by trial de novo

EVICTION DEFENSES: QUICK REFERENCE GUIDE

Common eviction defenses and supporting case citations are listed below:

1. Notice to vacate for ''no cause eviction'' less than 10 days before end of current rental month. Houston v. Chargois, 732 So. 2d 71 (La. App. 4th Cir. 1999); Bern Mas Apts. v. Seals, No. 96-CA-0106 (La. App. 4th Cir. 1996).

2. Notice to vacate fails to provide tenant with sufficient notice of grounds for eviction. Louisiana State Museum v. Mayberry, 348 So.2d 1274 (La. App. 4th Cir. 1977).

3. Notice to vacate (contents and/or service) fails to comply with federal regulations for subsidized housing evictions. Apollo Plaza Apts. v. Gosey, 599 So.2d 494 (La. App. 3d Cir. 1992); Versailles Arms Apts. v. Pete, 545 So.2d 1193 (La. App. 4th Cir.1989).

4. Rule for possession premature because filed before expiration of notice to vacate. Lichtentag v. Burns, 258 So.2d 211 (La. App. 4th Cir. 1972), writ denied 259 So.2d 916 (La. 1972); Bern Mas Apts. v. Seals, No. 96-CA-0106 (La. App. 4th Cir. 1996).

5. Acceptance of rent after notice to vacate defeats eviction. Housing Authority of Town of Lake Providence v. Allen, 486 So.2d 1064 (La. App. 2d Cir. 1986).

6. Delay in returning rent after notice to vacate defeats eviction. Four Seasons, Inc. v. New Orleans Silversmiths, Inc., 223 So.2d 686 (La. App. 4th Cir. 1969).

7. Acceptance of partial rent after notice to vacate defeats eviction. Adams v. Dividend, Inc., 447 So.2d 80 (La. App. 4th Cir. 1984); Housing Authority of Town of Lake Providence v. Burks, 486 So.2d 1068 (La. App. 2d. Cir. 1986).

8. Acceptance of a rent subsidy may defeat a subsidized housing eviction other than a nonpayment of rent eviction. La. Civ. Code art. 2712.

9. Timely tender of rent constitutes payment of rent which defeats eviction for nonpayment of rent. Adams v. Dividend, Inc., 447 So.2d 80, 83 (La. App. 4th Cir. 1984).

10. A late rent payment defeats eviction if there was a custom of accepting rent late. Versailles Arms Apts. v. Pete, 545 So.2d 1193 (La. App. 4th Cir. 1989).

11. Acceptance of rent may waive right to evict for lease violation. Quinn Property v. Sabine River, 676 So.2d 639 (La. App. 3d Cir. 1996).

12. Evictions are subject to judicial control and may be denied even if a lease violation exists. Carriere v. Bank of Louisiana, 702 So.2d 648 (La. 1996); Ergon v. Allen, 593 So.2d 438 (La. App. 2d Cir. 1992).

13. Unexpired fixed term lease cannot be terminated for ‘‘no cause.’’ La. Civ. Code art. 2686, 1983; Lee v. Badon, No. CA-2446 (La. App. 4th Cir. 1985).

14. The landlord failed to prove lease agreement and lease violation. Houston v. Chargois, 732 So. 2d 71 (La. App. 4th Cir. 1999).

15. Tenant not afforded opportunity to cure lease violation per rectification clause in lease. Shell Oil v. Siddiqui, 722 So.2d 1197 (La. App. 5th Cir. 1998); Raintree Court Apts. v. Bailey, No. 98-C-1138 (La. App. 5th Cir. 1998).

16. Unlawful discrimination. Mascaro v. Hudson, 496 So.2d 428 (La. App. 4th Cir. 1986). However, it is generally better to litigate such claims in federal or state district court before the eviction lawsuit is filed.

17. Failure to accommodate disabled tenant. S. Trafford, Using Reasonable Accommodations to Preserve Rights of Tenants with Disabilities, 33 Clearinghouse Rev. 131 (July-Aug 1999).2

17. Plaintiff is not the owner or landlord. Savoy v. Jones, 484 So.2d 233 (La. App. 3d Cir. 1986); Fradella Construction, Inc. v. Roth, 503 So.2d 25 (La. App. 4th Cir. 1986).

18. Res judicata or issue preclusion bars relitigation of eviction. La. R.S. 13:4231 et seq.; Avenue Plaza LLC v. Falgoust, 676 So.2d 1077 (La. 1996).

EVICTIONS

A. JURISDICTION

Justice of the Peace and district courts have jurisdiction over evictions of residential tenants and occupants regardless of the amount of monthly or yearly rent, or the rent for the unexpired term of the lease. La. Code Civ. Proc. art. 4912A. City and parish courts have jurisdiction over tenants if the monthly rental is less than $3,000 or the annual rental less than $36,000. La. Code Civ. Proc. Art. 4844. City and parish courts are courts of limited jurisdiction. A jurisdictional oddity exists in that these courts do not have express statutory jurisdiction over evictions of tenants where the lease term is other than a day, week, month or year. Jurisdiction is not specified for evictions involving, for example, a lease with a six month term. This is significant because the landlord must prove jurisdiction in order to use the

summary eviction procedure in a city or parish court. Arnona v. Arnona, 477 So.2d 120 (La. App. 4th Cir. 1985), writ denied 479 So.2d 367; see also Home Distribution, Inc. v. Dollar Amusement, Inc., No. 98-1692 (La. App.1st Cir. 9/21/99), 754 So.2d. 1057, fn 2 (law no longer provides a catchall judrisdiction clause for city and parish court evictions).

Historically, city and parish courts have only had jurisdiction over eviction of occupants where the annual value of the right of occupancy does not exceed the court's monetary jurisdiction. La. Code Civ. Proc. arts. 4844 A (5), 4842-43. However, Act 102 of 1999 amended art. 4844 A (5) to allow city and parish courts to have jurisdiction over evictions of occupants where the annual value of the occupancy is less than $36,000. As a practical matter, city and parish courts will have jurisdiction over virtually all evictions of residential tenants. Jurisdictional disputes will arise where the eviction lawsuit does not involve a ''tenant'' or ''occupant'' as defined by La. Code Civ. Proc art. 4704. For example, city and parish courts may lack jurisdiction where there is disputed title to the property or the defendant is a part owner. See e.g., Fradella Construction, Inc. v. Roth, 503 So.2d 25 (La. App. 4th Cir. 1986); St. Pierre v. Hirschfeld, 569 So.2d 222 (La. App. 1st Cir. 1990).

B. PROCEDURE FOR PROSECUTING AN EVICTION

1. Notice to Vacate

The first step in the eviction procedure is to deliver written notice to the tenant to vacate the premises. La. Code Civ. Proc. art. 4701. Most landlords use the form notice to vacate provided by the courts; however, they may draft their own notices. The notice must specify the grounds for termination of the lease. Louisiana State Museum v. Mayberry, 348 So. 2d 1274 (La. App. 4th Cir. 1977). La. Code Civ. Proc. art. 4701 provides for the written waiver of the notice to vacate. Such waivers have been enforced by the courts. See, e.g. Divincenti v. Redondo, 486 So. 2d 959 (La. App. 1st Cir. 1986).

The notice to vacate comes into play when a tenant's right of occupancy has ceased because of the termination of the lease by expiration of its term, by the landlord's action, by nonpayment of rent, or for any other reason. The grounds for eviction are generally (1) tenant's failure to pay rent as due, (2) tenant's breach of the lease, or (3) tenant's refusal to vacate the premises upon expiration of the lease. This statement of grounds must be placed in the notice to vacate, and subsequently in the citation to appear or rule to show cause. Louisiana courts have held that constitutional due process requires the statement to be in the notice to vacate to permit the tenant to prepare his defense. See e.g. La. State Museum v. Mayberry, 348 So. 2d 1274 (La. App. 4th Cir. 1977). See Apollo Plaza Apts. v. Gosey, 599 So. 2d 494 (La. App. 2d Cir. 1992) for a helpful case on what constitutes sufficient specificity.

Therefore, if a tenant does not receive the statement of grounds in the notice to vacate, he should argue a due process violation and/or lease violation if also applicable. Notices to vacate to federally subsidized housing tenants must also comply with applicable federal laws. See e.g. Versailles Arms Apartments v. Pete, 545 So.2d 1193 (La. App. 4th Cir. 1989); 24 C.F.R. § 982.310 (e). Notice to vacate must be delivered not less than 5 days nor more than 30 days before the premises are to be vacated. La. Code Civ. Proc. art. 4701. The time for delivery of the notice to vacate will be determined by the grounds for the eviction. If the eviction is for good cause, such as failure to pay rent, 5 days notice to vacate has been held to satisfy the requirements of the statute. Tete v. Hardy, 283 So. 2d 252 (La. 1973). No cause evictions of month-to-month tenants generally require 10 days prior notice. La. Civ. Code art. 2685-86. The fact that a tenant is given more than 10 days notice is not a fatal defect; the statute only requires a minimum of 10 days. Lilly v. Angelo, 523 So. 2d 899 (La. App. 4th Cir. 1988).

Thus, a landlord who wants a month-to-month tenant out of his apartment, for any or no reason, merely needs to give 10 days written notice to vacate prior to the expiration of the rental month. Management One v. Thibodeaux, 598 So. 2d 1224 (La. App. 4th Cir. 1992). The notice to vacate can be delivered by the landlord or served by the sheriff. In either case, the notice and service returns must be filed in the record. However, if the premises are abandoned or closed, or if the whereabouts of the tenant or occupant is unknown, the notice may be attached to a door of the premises. This is service by tacking. La. Code Civ. Proc. art. 4703. Other state or federal laws may impose additional requirements for the service of a notice to vacate on a subsidized tenant.

2. Rule For Possession

If the tenant fails to comply with the notice to vacate, judicial eviction proceedings may be commenced by a rule for possession of premises. La. Code Civ. Proc. art. 4732. This rule requires the tenant or occupant to show cause why he should not be ordered to deliver possession of the premises to the landlord or owner. The rule must state the grounds on which eviction is sought. La. Code Civ. Proc. art. 4371; St. Pierre v. Hirschfeld, 569 So.2d 222, 227 (La. App. 1st Cir. 1990). The rule for possession must be served by the sheriff or constable. Under current Louisiana statutory law, the rule may be served by tacking. La. Code Civ. Proc. art. 4703. A federal court judgment requires that all eastbank Orleans Parish rules be served by regular mail in addition to tacking. See Sylvester v. Detweiler, USDC No. 84-3399 (E.D. La. 1985). The rule may be heard no earlier than the third day after service of the rule on the tenant. La. Code Civ. Proc. art. 4732.

3. Trial

The rule to show cause why the tenant should not deliver possession is a summary proceeding. La. Code Civ. Proc. art. 2592 (3). Trial of the rule should be conducted quickly and without observing all of the formalities of an ordinary proceeding. La. Code Civ. Proc. art. 2591. Jury trials are not available in Louisiana eviction proceedings. La. Code Civ. Proc. art. 1732(3). At the trial, the landlord ‘‘theoretically’’ has the burden of establishing a prima facie case of entitlement to possession. There are three essential elements to a landlord’s cause of action: (1) the relation of landlord and tenant between the parties, (2) the expiration or termination of the lease, (3) that due notice to vacate has been served upon the tenant, as required by law. Miller v. White, 162 So. 638 (La. 1935). In addition, the landlord must show jurisdiction. Arnona v. Arnona, 477 So.2d 120 (La. App. 4th Cir. 1985), writ denied 479 So.2d 367. The landlord must establish his prima facie case by competent evidence. Houston v. Chargois, 732 So. 2d 71 (La. App. 4th Cir. 1999); Raintree Court Apts. v. Bailey, No. 98-C-1138 (La. App. 5th Cir. 1998).3 The burden then shifts to the tenant to refute the landlord’s case and to prove any affirmative or special defenses pleaded.

4. Judgment

The judgment of eviction must be rendered ‘‘immediately’’ after the trial of the rule. La. Code Civ. Proc. art. 4732. The failure to immediately render judgment probably makes the judgment invalid if it prejudices or prevents a timely appeal by the losing party. Cf. Versailles Arms Apts. v. Granderson, 377 So.2d 1359, 1362 (La. App. 4th Cir. 1979); Edenborn Partners v. Korndorffer, 652 So.2d 1027 (La. App. 5th Cir. 1995); Flores v. Gondolier, Ltd., 375 So.2d 400, 403 (La. App. 3d Cir. 1979). The judgment must be in writing. La. Code Civ. Proc. arts. 1911; 4923. Notice of the judgment must be given to the tenant if he was not served personally and made no appearance in the proceedings. La. Code Civ. Proc.

arts. 1913, 4923. In fact, notice of judgment should now be given in all cases because La. Civ. Code art. 2713 bars execution of an eviction judgment until proper notice of judgment has been given. The judgment of eviction against the tenant is also binding on sublessees. Scott v. Kalip, 197 So. 205 (La. App. 2d Cir. 1940)(sublessee has right to sue sublessor for damages, if any, as a result of the eviction). Judgment must be effective for at least 90 days. Act 24 of 2001 amending La. C.C.P. art. 4732.

5. Execution of Eviction Judgment

Pursuant to La. Code Civ. Proc. art. 4733, an eviction judgment is executed by applying for a warrant for possession if the tenant does not vacate within 24 hours after the ‘‘rendition’’ of judgment. ‘‘Rendition’’ means when a written judgment is signed. Housing Authority of City of Lake Charles v. Minor, 355 So.2d 270 (La. App. 3d Cir. 1977). Execution of the judgment requires the tenant to remove not only himself and his possessions, but also to deliver the property free of other occupants. Miles v. Kilgore, 191 So. 556 (La. App. 2d Cir. 1939). The warrant for possession typically directs the sheriff or constable to immediately execute the eviction judgment. They can force open doors and windows, and seize and sell the property to pay for the costs. La. Civ. Code art. 2714. Act 289 of 2001 amended La. Civ. Code art. 2713 to allow an eviction judgment to be executed within 24 hours after notice of the judgment.

C. PROCEDURE FOR DEFENDING AN EVICTION

1. Verified Answer and Affirmative Defense

A verified answer pleading an affirmative defense must be filed prior to the trial of the rule for possession to preserve the tenant’s right to suspensively appeal an eviction judgment. Thus, as a practical matter, the first step in defending an eviction is the preparation of a verifiedanswer to the rule for possession. The answer must be written, signed and sworn to by the tenant under oath. La. Code of Civ. Proc. art. 4735; McMillan v. Chauvin, 281 So. 2d 181 (La. App. 4th Cir. 1973); writ denied 283 So. 2d 770 (La. 1973); Papa v. Sullivan, 268 So. 2d 326 (La. App. 2d Cir. 1972). The answer must plead an affirmative defense entitling the tenant to retain possession of the premises. La. Code Civ. Proc. art. 4735; Sarpy v. de la Houssave, 217 So. 2d 783 (La. App. 4th Cir. 1968); Soloman v. Hickman 213 So. 2d 96 (La. App. 1st Cir. 1968). An affirmative defense should be specially pleaded and as specific as possible.

An affirmative defense in an eviction proceeding has been held to be one which raises a new matter not covered by the plaintiff’s petition and which would defeat the plaintiff’s demand on the merits, even if the plaintiff proves all of the allegations in his petition. Newport-Nichols Enterprises v. Grimes, Austin & Stark, Inc., 463 So. 2d 111 (La. App. 3d Cir. 1985) (held that defendant’s defense of judicial control entitled the tenant to a suspensive appeal.) ln Newport, the tenant pled good faith efforts to comply with the lease and that the breach of failing to furnish evidence of insurance was immaterial. Advocates should always plead the defense of judicial control. In Modicut v. Bremer, 398 So 2d 570 (La. App. 1st Cir. 1980), the plaintiff sued for eviction claiming non-payment of rent, and the defendant answered contending that he had complied with all of the terms and conditions of his lease. The court held that the defendant’s assertion of compliance was merely a general denial of the plaintiff’s allegation of non-payment. The plea of compliance was held not to have raised a new matter which would defeat the plaintiff’s claim, even if the claim was found to be true. The court held that a general denial is not an affirmative defense under La. Code Civ. Proc. art. 1005. Modicut appears to be contrary to Versailles Arms Apartments v. Granderson , 377 So. 2d 1359 (La. App. 4th Cir. 1979), in which the 4th Circuit

held that an allegation of timely tender of the rent due constituted an affirmative defense to an eviction for nonpayment of rent.

However, Modicut has been followed by the 4th Circuit. See, Liggio v. Judeh , 446 So. 2d 402 (La. App. 4th Cir. 1984) (tenant's suspensive appeal converted to devolutive because of lack of an affirmative defense). The rule applied in eviction appeals outside the 1st and 4th Circuits has or had generally been that an affirmative defense is one which, if proven, will have the effect of defeating the rule for possession on its merits. See e.g., Versailles Arms Apts. v. Granderson , supra ; cf., Doullut v. Rush, 77 So. 110 (La. 1917). To counter Modicut, one should plead the Newport-Nicholls Enterprises affirmative defense of judicial control of lease termination whenever possible. The Modicut decision, if applied, could deny tenants the right to retain possession in virtually all eviction appeals. As such, it arguably constitutes a denial of the state constitutional right to appellate review, or a denial of equal protection. See, Lindsey v. Normet, 405 U.S. 56 (1972). La. Const. Arts. I, Section 19, Section 22.

2. Motion to Continue

A brief continuance of the eviction trial must be granted under La. Code Civ. Proc. art. 1602 if you are unable, with the exercise of due diligence, to obtain evidence or witnesses material to the case. La. Code Civ. Proc. arts. 1602, 4831. In addition, due process requires that a tenant have a fair opportunity to present his case. Pernell v. Southall Realty, 416 U.S. 363, 385 (1974). Thus, subpoenae for witnesses and documents must be issued immediately so that the due diligence standard for a peremptory continuance will be met. Evictions involving federally subsidized tenants, the repair and deduct defense, or the abuse of right defense often require additional time in order to subpoena witnesses and documents. Landlords and courts must accommodate the disabled. One court has held that the Fair Housing Act requires continuances where the tenant's disability prevents his attendance. Anast v. Commonwealth Apts., 956 F. Supp. 79 (N.D. Ill. 1997).

3. Recordation of Testimony

A tenant has a state constitutional right to a verbatim recordation of the testimony adduced in an eviction trial. Also, you may require the Clerk of Court to take down the testimony in longhand. La. Code Civ. Proc. art. 2130. A verbatim recordation of the testimony should always be obtained if you anticipate an appeal (other than an appeal which is trial de novo). Reliance on a narrative of facts is not advised because the judge or opposing counsel will often control the contents of the narrative of facts. In addition, the procedure for preparing and filing an approved narrative of facts by the return date of the appeal (typically, one week after the judgment when testimony was not recorded) is burdensome on appellant's counsel. See La. Code Civ. Proc. art. 2131.

D. APPEALS AND POST-JUDGMENT REMEDIES

1. Appellate Jurisdiction

Appeals of all eviction cases from city court or parish court are taken to the court of appeal in the same manner as an appeal from the district court. La. Code Civ. Proc. art. 5001; 2081 et seq. Appeal from justice of the peace court is to the parish court or, if there is no parish court, to the district court of the parish where the justice of the peace is situated. La. Code Civ. Proc. art. 4924 A. Appeals from justice of the peace court are tried de novo in parish or district court, and no further appeal is allowed. La. Code Civ. Proc. art. 4924 B & C. At a trial de novo in parish or district court, the whole case is open for

decision and is retried as if there had been no prior trial whatsoever. Pardue v. Stephens, 558 So.2d 1149 (La. App. 1st Cir. 1989). Although no further appeals are allowed, the court of appeal has supervisory jurisdiction over the parish or district court's appellate jurisdiction and may reverse the eviction. La. Code Civ. Proc. art. 4924; Raintree Court Apts. v. Bailey, No. 98- C-1138 (La. App. 5th Cir. 1998)4; Sonnier v. Bourque, 194 So.2d 78 (La. App. 1st Cir. 1940); Lord v. Broussard, 526 So.2d 458 (La. App. 5th Cir. 1988). A writ appli-cation to reverse an appellate decision by a parish or district court should be accompanied by a request for a stay of the eviction judgment.

2. Motion For Suspensive Appeal

A. Parish and City Court Evictions

Application must be made to the trial court for suspensive appeal by written motion or petition, filed within 24 hours after the rendition of a judgment of eviction. La. Code Civ. Proc. arts. 4735, 2121. Rendition of judgment means a signed written judgment, not when the judgment was orally announced. Housing Authority of City of Lake Charles v. Minor, 355 So.2d 270 (La. App. 3d Cir. 1977). Note that the appeal may be premature if it is filed before the written judgment. La. Code Civ. Proc. art. 1911; but see Overmeir v. Traylor, 475 So.2d 1094 (La. 1985) (signing of final judgment cures defect). An appeal bond must also be filed within 24 hours of judgment, in an amount set by the trial court. La. Code Civ. Proc. art. 4735. The return day of the appeal is 30 days from the date costs are paid (45 days if there is testimony to be transcribed), unless the trial judge fixes a lesser period. The trial judge may grant only one extension for no more than 30 days. La. Code Civ. Proc. arts. 2125-2125.1. Counsel for appellant should check with the Clerk's office to ascertain if the record has been completed, and to pay the costs of filing an appeal, if an in forma pauperis order has not been obtained.

B. Justice of the Peace Court Evictions

Caution should be exercised in appeals of justice of the peace evictions. Currently, the procedures for appealing are unclear. La. Code Civ. Proc. arts. 4924-25 provide that appeals from judgments by a justice of peace require the filing of a suit for trial de novo in the district court or parish court. La. Code Civ. Proc. art. 4735 requires that suspensive appeals of evictions be applied for within 24 hours of rendition of an eviction judgment. Cases decided under the prior justice of peace appeal statutes held that a motion for appeal must be filed with the justice of peace court. See Housing Authority of St. John the Baptist v. Butler, 405 So.2d 1252 (La. App. 4th Cir. 1981); City of Gretna v. DiLeo, 490 So.2d 1252 (La. App. 5th Cir. 1986). Butler was decided before Act 156 of 1986 when the current La. Code Civ. Proc. arts. 4924 and 5003 were respectively arts. 5002 and 5004. Butler cited art. 5004 as authority for the proposition that art. 2121 governed and that therefore only the justice of peace court could grant the appeal.

However, prior art. 5004 (now art. 5003) expressly applied to the chapter governing appeals of city, parish and justice of the peace court judgments. Act 156 of 1986 omitted justice of the peace courts from the chapter to which art. 5003 (previously art. 5004) applies while retaining the language of arts. 5002 and 5004 in the new arts. 4924 and 5003. The new chapter governing justice of the peace courts has no provision that makes art. 2121 applicable to appeals from justice of the peace courts. In addition, La. Code Civ. Proc. art. 2081 expressly states that art. 2121 is applicable to appeals to the courts of appeal and supreme court. Given the changes made by Act 156 of 1986, is Butler still good law? Until Butler is overruled, it may be advisable to file the motion for appeal with the justice of the peace court and a petition for trial de novo with the ‘‘appellate’’ court, i.e., district or parish court. Of course, there are

serious problems with perfecting appeals of justice of the peace judgments under this confused state of the law. First, some justices of the peace will not grant appeals. Second, it is often impossible or impractical to file an appeal with a justice of the peace within 24 hours of the judgment since they don't have the staff or facilities to receive such emergency filings. Filing a motion for appeal with the justice of the peace and a petition for trial de novo with the appellate court within 24 hours is extremely difficult.

3. Appeal Bonds

Most judges fix the suspensive appeal bond in an amount equal to the rent that will accrue during the appeal. The motion for suspensive appeal should contain a provision for setting the amount of the appeal bond. In forma pauperis litigants are not exempted from the requirement of a suspensive appeal bond. La. Code Civ. Proc. art. 5185(B). Form appeal bonds may be provided by the court. The surety on the appeal bond must have net assets in excess of the amount of the bond, and must be a resident of the parish where the eviction is brought. La. Code Civ. Proc. art. 5122. The formalities of the bond must be strictly complied with, on penalty of subjecting the surety to possible false swearing charges. The landlord may test the sufficiency, solvency, or legality of the bond by rule. La. Code Civ. Proc. art. 5123. If at the rule the surety is found insufficient or invalid, the tenant-appellant has 4 days to correct the deficiency by filing a new or supplemental bond. La. Code Civ. Proc. art. 5124. Appellant has two opportunities to correct a deficient bond. La. Code Civ. Proc. art. 5126. The tenant-appellant may file a corrected bond at any time prior to the filing of a rule to test the original bond. La. Code Civ. Proc. art. 5124. If your client is unable to obtain a surety bond, be prepared to file a motion for an alternative bond, e.g., payment of each month's rent as due into the court registry. See, e.g., Steward v. West, 449 F. 2d 324 (5th Cir. 1971) (as long as the tenant continued to pay rent, it was very unlikely that the landlord would suffer any harm during the pendency of the appeal). Louisiana courts have authorized the use of such alternative bonds. See, e.g., Lakewind East Apts. v. Poree, 629 So.2d 422 (La. App. 4th Cir. 1993). In Gross v. Williams, No. 99-C-1865 (La. App. 4th Cir. 1999), the appellate court reduced a subsidized tenant's appeal bond to monthly payment of her share of the rent into the court registry where the housing authority continued the payment of rent subsidies to the landlord.5 Failure to move for the dismissal of a suspensive appeal within three days of the appeal record lodging may waive objections to the timeliness of a bond. La. Code Civ. Proc. 2161; Wright v. Jefferson Roofing, Inc. 630 So.2d 773 (La. 1994); but see Lakewind East Apts. v. Poree, 629 So.2d 422 (La. App. 4th Cir. 1993)(rule does not apply to ‘‘continuing’’ bond of monthly rental payments).

4. Effect of Suspensive Appeal

A suspensive appeal stays execution of the eviction judgment. If the tenant's eviction appeal is denied by the court of appeal, the judgment becomes final and executory in 30 days, unless the tenant applies for a writ of certiorari. Timely application to the Louisiana Supreme Court for a writ of certiorari precludes execution of the eviction judgment until the Supreme Court rejects the writ application or appeal. La. Code Civ. Proc. art. 2166; but see Nathans v. Vuci, 443 So. 2d 690, 695 (La. App. 1st Cir 1983). Note that tenants appealing justice of the peace decisions apparently do not have a statutory suspension (similar to art. 2166) when they seek supervisory review of a district or parish court appeal decision. _A final appellate judgment may be executed in the trial court without further notice after the landlord has filed a certified copy of the appellate judgment with the clerk of trial court. La. Code Civ. Proc. art. 2167. The lease is not dissolved until the judgment decreeing cancellation becomes final. Thus, the landlord's and tenant's obligations remain in effect during the suspensive appeal. Cf. Reed v.

Classified Parking System, 324 So. 2d 484, 490 (La. App. 2d Cir. 1975); but see, Smith v. Castro Brothers Corp., 443 So. 2d 660 (La. App. 4th Cir. 1983), writ denied 446 So. 2d 1229, 1231 (La. 1984).

5. Rent Obligation During Pendency of Appeal

One court has held that a suspensive appeal does not suspend a tenant's obligation to pay rent as it becomes due during the appeal. Thus, failure to pay rent in a subsequent month can constitute a separate cause of action for which the landlord can sue to evict the tenant, despite the pendency of a suspensive appeal. Sarpy v. Morgan, 426 So. 2d 292 (La. App. 4th Cir. 1983). Given Sarpy, a tenant should timely tender the rent as it becomes due during the appeal. Also, failure to timely pay rent to the court registry pursuant to an appeal bond could result in dismissal of the tenant's suspensive appeal. Lakewind East Apts. v. Poree, 629 So.2d 422 (La. App. 4th Cir. 1993).

6. Motion to Dismiss Appeal

The following scenario threatens tenants with the loss of their constitutional rights of appellate review of eviction judgments: o tenant's suspensive appeal is dismissed because of lack of an affirmative defense, Modicut v. Brewer, supra, or inability to pay bond

-- landlord executes the eviction judgment
-- tenant moves out t-- avoid trespass charges, etc.
-- the tenant's devolutive appeal is then dismissed for mootness. See, Curran Place Apts. v. Howard, 563 So. 2d 577 (La. App. 4th Cir. 1990).

Howard was incorrectly decided. In New Orleans Hat Attack, Inc. v. N.Y. Life Insurance Co., 665 So.2d 1186 (La. App. 4th Cir. 1995), the court held that an evicted tenant who takes a devolutive appeal does not acquiesce in the judgment when he vacates the premises and that, as a general rule, does not forfeit his right to a devolutive appeal by compliance with the judgment. N.Y. Life Insurance distinguished Howard and similar cases by noting that they involved expired leases. Under N.Y. Life Insurance, the devolutive appeal of a tenant with an unexpired lease would not be mooted out by his vacating the premises. At trial, introduce the lease and evidence about the type of housing involved. Leases of public and certain subsidized housing do not expire at the end of their terms. Therefore, eviction appeals involving such leases should not become moot. It is also important to demonstrate that the tenant is not acquiescing in the eviction judgment by moving out. One suggestion is to write a letter to the landlord or the landlord's attorney saying that the tenant does not intend to forfeit his appeal rights, and that he is only moving out to avoid a trespass charge. A landlord who evicts a tenant during a devolutive appeal is monetarily liable for wrongful eviction if the judgment is ultimately reversed. Mangelle v. Abadie, 19 So. 670 (La. 1896); New Orleans Hat Attack, Inc. v. N.Y. Life Insurance Co., 665 So.2d 1186 (La. App. 4th Cir. 1995). Ask the landlord to agree to defer execution of eviction pending appeal. It is imprudent for a subsidized landlord to evict during a devolutive appeal since he could lose his subsidies during the appeal. A tenant who moves out should record a notice of his devolutive appeal in the parish mortgage office under La. Civ. Proc. art. 3751 et seq. in order to protect his rights against third parties. See Ducote v. McCrossen, 675 So.2d 817 (La. App. 4th Cir. 1996). In addition, a devolutive appeal is not moot because the eviction judgment will be res judicata as to any subsequent suit for wrongful eviction. Mangelle v. Abadie, 19 So. 670 (La. 1896); see also Avenue Plaza LLC v. Falgoust, 677 So.2d 1077 (La. 1996); La. R.S. 13:4231 et seq.

7. Supervisory Writs

If a tenant cannot comply with the requirements for a suspensive appeal, it may be possible to obtain review of the eviction judgment through an application for supervisory writs and stay order. See, Uniform Rules - Courts of Appeal 4.4; Doullut v. Rush, 77 So. 110 (La. 1917). Both the court of appeal and the trial court have the discretion to stay the eviction pending the determination of the supervisory writ application. Uniform Rules - Courts of Appeal, Rule 4.4; A. Tate, Supervisory Powers of the Louisiana Courts of Appeals , 38 Tul. L. Rev. 429, 435 (1954); see also Fabacher v. Hammond Dairy , 389 So. 2d 87, 89-90 (La. App. 4th Cir. 1980); but see Veillon v. Veillon, 517 So.2d 941 (La. App. 3d Cir. 1987)(supervisory writs cannot be used as a substitute for suspensive appeal).

8. Motion for New Trial

Sometimes, a tenant may come to you for help after judgment. A motion for new trial must be granted if the judgment is contrary to the law and evidence. La. Code Civ. Proc. art. 1972. A new trial may be granted for good cause. La. Code Civ. Proc. art. 1973. In Housing Authority of City of Ferriday v. Parker, 629 So.2d 475 (La. App. 3d Cir. 1993), the court of appeal reversed a denial of a new trial where the notices of the hearing date were confusing. New trials in parish or city courts must be applied for within 3 days of the signing of judgment or service of the notice of judgment if such is required by art. 4905. La. Code Civ. Proc. art. 4907. Oddly, the delay for a new trial motion in a justice of peace court appears to be the same as for district court, i.e., 7 days. Cf. La. Code Civ. Proc. arts. 4925, 4922, 4831. A motion for new trial does not extend the deadline for a suspensive appeal of an eviction.6 Therefore, it should include a motion for stay.

9. Petition for Nullity of Judgment

A final comment should be made regarding the remedies of the client who seeks advice after judgment of eviction has already been rendered. This occurs most commonly when a default judgment has been rendered against the client, and the client alleges nonreceipt of service of process or payment of the rent prior to the eviction judgment. A petition for nullity of judgment may be appropriate if there are arguable grounds for nullification. See, La. Code Civ. Proc. art. 2001-2006; Joiner v. Housing Authority of New Orleans. 238 So. 2d 196, 197 (La. App. 4th Cir. 1970). Default judgments of eviction based only on tacking service could be subject to nullification because the United States Supreme Court has held that tacking service is constitutionally inadequate in eviction cases. Greene v. Lindsey , 456 U.S. 444 (1982); La. Code Civ. Proc. art. 2002; but see, Friedman v. Hofchar, Inc., 424 So. 2d 496 (La. App. 5th Cir. 1982), writ denied, 430 So. 2d 74 (La. 1983). The Constable of First City Court for the City of New Orleans must also serve Rules for Possession by regular mail pursuant to Sylvester v. Detweiler, USDC No. 84-3399 (E.D. La.)(class action consent judgment based on Greene). Misrepresentations by the landlord that are material to obtaining the default judgment are grounds for nullification. Cf., Temple v. Jackson , 376 So. 2d 972 (La. App. 1st Cir. 1979).

The typical misrepresentations that occur in eviction defaults are (1) that the lease is only month-to-month when the tenant has a written lease for a fixed term, which precludes no cause evictions, and (2) nonpayment of rent when the landlord has, in fact, accepted the rent. A landlord who makes such misrepresentations may be liable under the Unfair Trade Practices Act for the tenant’s damages. Additionally, a judgment may be annulled where its enforcement would be unconscionable and inequitable and in impairment of one’s legal right, even if no intentional wrongdoing is found. Bradford v. Thomas, 499 So. 2d 525 (La. App. 2d Cir. 1986), writ denied 503 So. 2d 480 (La. 1987) (judgment placing universal legatee under will in possession of testator’s estate was properly annulled for legatee’s

failure to present entire succession record to court, which would have informed court that legatee's right to possess was under formal attack). Default judgments in which the record itself discloses an insufficient notice to vacate, or a premature rule date, can usually be nullified since eviction court judges generally recognize that a default judgment should not have been entered. See generally, La. Code Civ. Proc. arts. 4732, 1701-03; Baham v. Faust, 382 So. 2d 211 (La. App. 4th Cir. 1972), writ denied 259 So. 2d 916 (La. 1972). A petition for nullity of judgment and injunctive relief should generally be brought in the trial court that rendered the eviction judgment. La. Code Civ. Proc. art. 2006.

The petition for nullity of judgment may be filed in the eviction case. A petition for nullity of judgment is an ordinary proceeding and does not stay the execution of the allegedly null judgment. Therefore, such petitions should be verified and include an application for a temporary restraining order and preliminary injunction. The tenant may be able to obtain a stay pending an appeal of the preliminary injunction denial. See. e.g., Housing Authority of New Orleans v. Lee, 480 So.2d 998 (La. App. 4th Cir. 1985). The verified petition for nullity of judgment should include factual allegations which show that the tenant will suffer irreparable injury if a temporary restraining order is not granted. Irreparable injury is present in virtually all evictions involving indigents. Irreparable injury is not required if the landlord has violated a prohibitory law. See e.g., St. Charles Gaming v. Riverboat Gaming, 648 So.2d 1310 (La. 1995). You should have the preliminary injunction hearing set as late as possible because applications for preliminary injunctions against evictions may be denied. The critical issue is generally whether the tenant has a ''prima facie'' case on the merits. This is a relatively easy standard for a tenant to meet. See, e.g., Continental Titles, Inc. v. U.S. Fire Insurance Co., 413 So. 2d 216 (La. App. 4th Cir. 1982) It may be advantageous to persuade opposing counsel to stipulate to a consolidation of the preliminary injunction hearing with the trial on the merits. This tactic could enable you to nullify the eviction judgment even if irreparable injury is not proven.

E. FEDERAL REMEDIES

Occasionally, a tenant may be able to obtain a federal court injunction against an eviction. For example, execution of a default eviction judgment based only on tacking service should be enjoinable in federal court. Cf. Greene v. Lindsey, 456 U.S. 444 (1982); Porter v. Lee, 328 U.S. 246 (1946). Subsidized housing tenants may be able to enjoin evictions brought in violation of constitutional rights or federal regulations. See generally, National Housing Law Project, HUD Housing Programs, Ch. 14 (2d Ed. 1994). Eviction of tenants based on unlawful discrimination can be enjoined under the Fair Housing Act and 42 U.S.C. § 1982. See e.g, Bill v. Hodges , 628 F. 2d 844, 845 (4th Cir. 1980). Federal injunctive relief may not be feasible if the tenant's entitlement depends on contested factual issues. See, e.g., Higbee v. Starro, 698 F.2d 945 (8th Cir. 1983) (injunction of retaliatory eviction denied because of difficulty of proving that retaliation was substantial motivating factor in decision to evict).

Housing discrimination cases involving contested factual issues and a discriminatory eviction may be better litigated in state district court where lis pendens will require the eviction to be litigated in district court if the tenant's affirmative lawsuit is filed first. Finally, it should be noted that evictions are automatically stayed by the filing of a bankruptcy petition. 11 U.S.C.§ 362; see, e.g., In Re Smith Corset Shops, Inc., 696 F. 2d 971, 976 (1st Cir. 1982); Derek Milo Couture v. Burlington Housing Authority, 225 B.R. 58 (D.Vt. 1998)7; National Consumer Law Center, Consumer Law for Housing Lawyers: Bankruptcy, 23 Clearing-house Rev. 699 (Oct. 1989). The automatic stay provisions of bankruptcy law are applicable even if the landlord has a state court judgment for possession of the premises. Matter of Gibbs, 9 B.R. 758 (Bank. D. Conn. 1981), aff'd in part, remanded in part sub. nom. Gibbs v. New Haven Housing Authority, 76 B.R. 257, 263 (D. Conn. 1983). A complaint to enforce the stay should be filed

with the Bankruptcy Court in order to bar any attempted state court eviction. Bankruptcy petitions can be a particularly powerful remedy for public housing tenants who face eviction for nonpayment of rent. The landlord's removal of the tenant's possessions after the tenant has filed a petition in bankruptcy violates the automatic stay and justifies the award of attorney's fees. In re Davis, CCH ¶ 71, 221 (S. D. Ohio 1986). Attorneys acting on behalf of landlords or other creditors may be personally held in contempt if their clients take an action that violates the stay. However, the bankruptcy code provides relief from the automatic stay in certain cases. 11 U.S.C. § 362(d). Many housing issues will be litigated through opposition to relief from the stay.

F. DEFENSES TO EVICTION

1. Introduction

Your client's eviction will be based on either (1) ''no cause'', i.e., the expiration of the lease, (2) nonpayment of rent, or (3) ''good cause'', i.e., a material violation of the lease. No cause evictions most commonly involve 10 day terminations of month-to-month leases. Defenses vary according to the type of eviction. The most common defenses to the major types of eviction are discussed below. Procedural defenses, e.g., inadequate notice to vacate or premature rule for possession, are applicable to all evictions. See discussion below.

2. No Cause Eviction

a. Inadequate Notice to Vacate

A notice to vacate must be timely, written and properly served. La. Civ. Code art. 2686; La. Code Civ. Proc. art. 4701-03. An improper notice to vacate should result in the dismissal of the rule for possession. Versailles Arms Apartments v. Pete , 545 So.2d 1193, 1195 (La. App. 4th Cir. 1989). The statutory requirements for notice and service may be modified by the lease agreement unless the tenant lives in public or subsidized housing.

The notice must unambiguously state the landlord's intent to have the tenant vacate the premises. Mere notice that the tenant is to contact the landlord without stating the latter's purpose is inadequate as a notice to vacate. Buchanan v. Daspit, 245 So. 2d 506 (La. App. 3d Cir. 1971).

Untimely service of the notice to vacate is commonly accepted by the trial courts as a defense to a no cause eviction. A month-to-month lease cannot be terminated for no cause unless 10 days notice to vacate is given prior to the end of the rental month. La. Civ. Code art. 2686. Houston v. Chargois, 732 So.2d 71 (La. App. 4th Cir. 1999); Bern Mas Apts. v. Seals, No. 96-CA-0106 (La. App. 4th Cir. 1996). The date of delivery of the notice to vacate should not be included in the computation of the 10 day period. La. Code Civ. Proc. art. 5059. The last day of the period should be included unless it is a legal holiday, in which case the period runs until the end of the next day which is not a legal holiday. La. Code Civ. Proc. art. 5059. Service of the notice to vacate may be made by personal, domiciliary or tacking service. La. Code Civ. Proc. arts. 1231-34, 4703. In addition, a notice to vacate can sometimes be served by mail. See Maxwell, Inc. v. Mack Trucks, Inc., 172 So. 2d 297 (La. App. 4th Cir. 1965), writ denied 174 So. 2d 131 (La. 1965). The notice to vacate may not be served by a justice of the peace. La. Atty. Gen. Op. 97-295, 97-349. If this happens, the judge may have to recuse himself since he acted as the landlord's agent.

Tacking service of the notice to vacate by the sheriff or landlord has been upheld by Louisiana courts. Fairfield Property Mgt. v. Evans, 589 So. 2d 83 (La. App. 2d Cir. 1991); Ernest Joubert Company v. Tatum, 332 So. 2d 553 (La. App. 4th Cir. 1976); Alaimo v. Hepinstall, 377 So. 2d 889 (La. App. 4th Cir. 1979). This rule is not altered by Greene v. Lindsey, 456 U.S. 444 (1982) because it only invalidated tacking service of eviction lawsuits. However, tacking service is theoretically permissible only in limited circumstances, i.e., ‘‘if the premises are abandoned or closed, or if the whereabouts of the lessee or occupant is unknown.’’ La. Code Civ. Proc. art. 4703. Whether tacking service was properly used by a landlord is a factual question. Friedman v. Hofchar, 424 So. 2d 496, 498 (La. App. 5th Cir. 1982), writ denied 430 So. 2d 74 (La. 1983). The defense of improper use of tacking service is difficult to prove because the sheriff’s return showing service is presumed to be correct. The burden is on the tenant to prove the incorrectness of the sheriff’s return by clear and convincing evidence. See, League Central Credit Union v. Gagliano, 336 So.2d 931 (La. App. 4th Cir. 1976).

It should be noted that no presumption of correctness applies when the notice to vacate is served by the landlord rather than the sheriff. Here, service of the notice must be proven by competent evidence. Where the credibility of neither is attacked, contradictory testimony by the landlord and the tenant requires a decision in favor of the tenant. See Alphonso v. Alphonso, 422 So.2d 210 (La. App. 4th Cir. 1982). If service was by regular mail, the landlord would probably be unable to establish the actual date of delivery.

b. Premature Rule for Possession

The landlord’s rule for possession is premature if it is filed before the expiration of the applicable delay, 5 or 10 days, required for the notice to vacate. The landlord must allow the tenant a full 5 or 10 days from the date of service of the notice to vacate before filing a rule for possession in court. La. Code Civ. Proc. arts. 4701; 4731. Lichtentag v. Burns, 258 So. 2d 211 (La. App. 4th Cir. 1972), writ denied 259 So. 2d 916 (La. 1972); Bern Mas Apts. v. Seals, No. 96-CA-0106 (La. App. 4th Cir. 1996).

A legal holiday is not included in the computation of the period for a 5 day notice to vacate or where it would otherwise be the last day of the notice period (whether 5 days or 10 days). La. Code Civ. Proc. art. 5059 (definition of legal holidays per parish or court); La. Rev. Stat. 1:55; Lichtentag v. Burns, supra (5 day notice); Bendana v. Stokes, No. 10967 (La. App. 4th Cir. 1979).

c. Lease or Other Agreement

An unexpired fixed term lease is a defense to a no cause eviction. A fixed term lease cannot be canceled for no cause by a 10 day notice to vacate (unless the lease has a ‘‘no cause’’ cancellation provision). La. Civ. Code arts. 2686, 1983; Lee v. Badon, No. CA-2446 (La. App. 4th Cir. 1985). However, be advised that some eviction court judges mistakenly believe that any lease can be canceled for no cause on 10 days notice to vacate.

A written or oral agreement to lease can be a defense to a no cause eviction even if the final agreement of lease has not been signed. See, e.g., City of New Orleans v. Cheramie, 509 So. 2d 58 (La. App. 1st Cir. 1987), writ denied 512 So. 2d 463; City of New Orleans v. Hautot, 185 So. 2d 24 (La. App. 4th Cir. 1966); Auto-Lec Stores v. Quachita Valley Camp No. 10 W.O.W., 171 So. 62 (La. 1936). However, in order to enforce the agreement to lease, the tenant must be able to prove that all of the details and conditions of the lease were agreed to and understood by the parties.

A third party beneficiary can use a third party beneficiary contract (stipulation pour autrui), that confers a continued right of occupancy, as a defense to a no cause eviction. La. Civ. Code arts. 1978, 1987; La. Code Civ. Proc. arts. 424, 4732; cf., Miller v. White, 162 So. 638 (La. 1935); Tri-Parish Heating & Air Conditioning v. Brown, 338 So. 2d 126 (La. App. 1st Cir. 1976). For definitions of stipulation pour autrui and third party beneficiary contract, see Hargroder v. Columbia Gulf Transmission Co. , 290 So. 2d 874 (La. 1974); Logan v. Hollier, 699 F. 2d 758 (La. App. 5th Cir. 1983); Holbrook v. Pitt , 643 F. 2d 1261 (7th Cir. 1981); Free v. Landrieu, 666 F. 2d 698 (1st Cir. 1981) (Section 8 HAP contract is a third party beneficiary contract).

d. Federally Subsidized Housing Programs

Of course, tenants in federally subsidized housing programs cannot be evicted for no cause. See e.g., Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969); 42 U.S.C. § 1437 f(d)(l)(B)(ii); 24 C.F.R. § 247.3. State courts have a duty to enforce federal laws that prohibit no cause evictions. U.S. Const. Art. VI; cf., Lee v. Florida, 392 U.S. 378, 385-86 (1968).

e. Acceptance of Rent

Acceptance of the rent after the required notice to vacate, but before the judgment of eviction, vitiates the notice to vacate, and prevents the landlord from obtaining judgment based on the notice. Housing Authority of Town of Lake Providence v. Allen, 486 So. 2d 1064 (La. App. 2d Cir. 1986); Passalaqua v. Mendez, 388 So. 2d 1172 (La. App. 4th Cir. 1980); Mitchell v. V-6 Co. Inc., 372 So. 2d 645 (La. App. 1st Cir. 1979). The notice to vacate may even be vitiated if the landlord delayed in returning the tenant's rent payment. Four Seasons, Inc. v. New Orleans Silversmiths, Inc., 223 So. 2d 686 (La. App. 4th Cir. 1969). Acceptance of part of the rent vitiates the notice to vacate. Adams v. Dividend, Inc., 447 So. 2d 80 (La. App. 4th Cir. 1984); Thompson v. Avenue of Americas Corp., 499 So. 2d 1093 (La. App. 3d Cir. 1986); Housing Authority of Town of Lake Providence v. Burks, 486 So.2d 1068 (La. App. 2d. Cir. 1986).

f. Abuse of Right (Retaliatory Eviction)

An abuse of right is an act which objectively appears to be an exercise of an individual right, but which is not protected by the courts because it is exercised with a predominant intent to harm; or it is performed without a serious and legitimate interest; or it is contrary to good faith or moral rules. CuetaRua, Abuse of Rights, 35 La. L. Rev. 965 (1975). Retaliatory eviction is the refusal to renew a lease which has a stated term in retaliation for a tenant's attempt to secure his rights under the lease or applicable law. The abuse of right defense has been expressly recognized as an eviction defense. Capone v. Kenny, 646 So.2d 510 (La. App. 4th Cir. 1994); see also, Illinois Central R. Co. v. International Harvester, 368 So. 2d 1009, 1013-15 (La. 1979); Housing Authority of City of Abbeville v. Hebert, 387 So. 2d 693 (La. App. 3d Cir. 1980), writ refused 394 So. 2d 275 (La. 1980), writ not considered 396 So. 2d 882 (La. 1981). However, the appellate courts have never dismissed an eviction for abuse of right.

The key to winning a retaliatory eviction defense is proving the landlord's retaliatory motive. The proof of retaliatory intent is often difficult. Unless the landlord issues actual threats, the evidence of his intent may amount to no more than the juxtaposition of a threat of some kind followed by a notice to vacate. Legislation in some states creates a presumption that a notice which follows soon after an act by the tenant to secure his rights is retaliatory. G. Armstrong, Louisiana Landlord and Tenant Law (1988). Louisiana currently requires the tenant to prove that the notice to vacate was issued in retaliation for a

good faith attempt by the tenant to secure his rights. Real Estate Services, Inc. v. Barnes, 451 So.2d 1229 (La. App. 4th Cir. 1981).

For information on proving a retaliatory eviction, see 1 Am. Jur. POF 2d 197; Player, Motive and Retaliatory Eviction of Tenants, 1974 U. Ill. L.F. 610; Note, Landlord and Tenant Burden of Proof Required to Establish Defense of Retaliatory Eviction, 1971 Wis. L. Rev. 939; Comment, Prohibition Against Retaliatory Eviction in Landlord-Tenant Relations: Study of Practice and Proposals, 54 N.C.L. Rev. 861 (1976). It can be argued that once the tenant makes a prima facie case of retaliation, the burden of proof shifts to the landlord to show that the decision to evict was independent of the tenant's exercise of his legal rights. See, e.g., Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977); Robinson v. Diamond Housing Corp., 463 F. 2d 853 (D.C. Cir. 1972); Parkin v. Fitzgerald, 240 N.W. 2d 828 (Minn. 1976).

g. Owner-Occupant Relationship

Occasionally, a no cause eviction can be delayed if it is brought as a rule to evict a nenant when there is an owner-occupant relationship, rather than a landlord-tenant relationship, between the litigants. A rule to evict a tenant may be subject to a defense of no cause of action if the defendant is an occupant rather than a tenant. See, e.g., Edwards v. Edwards, 439 So. 2d 478 (La. App. 1st Cir. 1983); Stroughter v. Shepard, 207 So. 2d 865 (La. App. 4th Cir. 1968).

3. Eviction for Nonpayment of Rent

a. Determination of Rent Due

Rent may not legally be increased during the term of a lease in the absence of a valid rent escalation clause. La. Civ. Code art. 1983. Escalation clauses can be invalidated if the price is not readily ascertainable, or is dependent on the landlord's whim. See, e.g., La. Atty. Gen. Op. 79-1295 (Dec. 3, 1979); 78-937 (July 21, 1978); Arata v. Louisiana Stadium and Exposition District, 225 So. 2d 362, 366 (La. 1969), cert. denied 396 U.S. 279 (1970).

A landlord cannot unilaterally increase a month-to-month tenant's rent unless 10 days notice is given prior to the expiration of the current rental month. La. Civ. Code arts. 2686, 1983.

In the case of a federally subsidized tenant, the determination of the rent due may be a complex legal and factual question which could be dispositive of the eviction lawsuit. See, e.g., Peoria Housing Authority v. Sanders. 298 N.E. 2d 173 (Ill. 1973); see also National Housing Law Project, HUD Housing Programs, Ch. 3 (2d Ed.1994). Public housing evictions can also be defeated by the defense of rent abatement. HANO v. Wilson, 503 So. 2d 565 (La. App. 4th Cir. 1987). Some judges will not allow an eviction for nonpayment of rent if the rent has been tendered, but refused because it was not accompanied by payment of nonrent charges, e.g., alleged late fees or property damage. Cf. La. Civ. Code art. 2700.

b. Payment

This defense is self-explanatory. However, there are some issues related to the defense of payment which merit investigation. Was payment tendered, but refused? Has the landlord wrongfully applied a rent payment to a nonrent obligation? See La. Civ. Code arts. 1864-1867. Are there any circumstances

surrounding the nonpayment of rent which would persuade a court to exercise its equitable discretion not to evict? Has the landlord accepted the rent prior to the eviction trial or delayed in returning a tenant's rent payment? See Pasalaqua v. Mendez , 388 So 2d 1172 (La. App. 4th Cir. 1980); Four Seasons, Inc. v. New Orleans Silver-smiths, Inc., 223 So. 2d 686 (La. App. 4th Cir. 1969). Acceptance of the rent after the judgement generally does not vitiate the notice to vacate. Nathans v. Vuci, 443 So. 2d 690 (La. App. 1st Cir 1983). But see Deslonde v. O'Hern, 1 So. 286 (La. 1887)(improper for landlord to execute judgement of acceptance of rent created a new lease obligation).

c. Tender

A landlord cannot evict a tenant for nonpayment of rent if he improperly refused the tenant's tender of rent. A timely tender of rent constitutes payment. See, La. Civ. Code art. 1869; Saxton v. Para Rubber Co. of Louisiana, 118 So. 64 (La. 1928); Adams v. Dividend, Inc., 447 So. 2d 80 (La. App. 4th Cir. 1984). The tenant should take the necessary steps to perfect a valid tender. Generally, it is not necessary to deposit the rent in the court registry. Adams v. Dividend, Inc., supra at 83.

Under present Louisiana law, a private landlord has the right to evict a tenant who tenders the rent after the due date, even if the tender occurred prior to the notice to vacate or rule for possession (absent a rectification period clause). See, Noble v. Coleman, 423 So. 2d 776 (La. App. 4th Cir. 1982) ; Dorsa v. Parent, 352 So. 2d 258 (La. App. 1st Cir. 1977); Himbola Manor Apartments v. Allen, 315 So. 2d 790 (La. App. 3d Cir.1975). Nonetheless, some courts will refuse to evict a tenant if the rent was offered prior to the notice to vacate, rule for possession, or trial.

d. Rectification Period

Payment of rent within a rectification or curative period provided by the lease agreement (oral or written), or federal law, would bar an eviction for nonpayment of rent. See, Shell Oil v. Siddiqui, 722 So.2d 1197 (La. App. 5th Cir. 1998); Sands v. McConnell, 426 So. 2d 218 (La. App. 4th Cir. 1982); Ford v. Inde-pendent Bakers Supply, Inc., 385 So. 2d 580 (La. App. 4th Cir. 1980).

e. Custom of Late Payment

The untimely tender of rent may be a defense if a custom of accepting late payment has developed. In this situation, the landlord is deemed to have waived his right to demand strict compliance with the lease without first putting the tenant in default, or otherwise giving notice that timely payment will be required in the future. See, e.g., Versailles Arms Apartments v. Pete, 545 So.2d 1193 (La. App. 4th Cir. 1989); Housing Authority of St. John the Baptist Parish v. Sheperd, 447 So. 2d 1232 (La. App. 5th Cir. 1984); Grace Apartments v. Hill, 428 So. 2d 862 (La. App. 1st Cir. 1983). However, no custom of late payment is established if the landlord has made frequent and unsuccessful demands for punctual payment, or where acceptance of late payments is the result of unwilling indulgence on the landlord's part. Himbola Manor Apartments v. Allen, 315 So.2d 790 (La. App. 3d Cir. 1975); cf. Shank-Jewella v. Diamond Gallery, 535 So. 2d 1207 (La. App. 2d Cir. 1988) (acceptance of late payments involuntary).

f. Repair and Deduct

A tenant may use the repair and deduct provisions of Louisiana Civil Code art. 2694 as an affirmative defense to an eviction for nonpayment of rent. Lake Forest, Inc. v. Katz & Besthoff No. 9 Inc., 391 So. 2d 1286 (La. App. 4th Cir. 1980); Cameron v. Krantz, 299 So. 2d 919 (La. App. 3d Cir. 1974).

A detailed discussion of the requirements for proper utilization of the repair and deduct remedy is provided infra. Because of the technical nature of the repair and deduct law, it is best to carefully plan this defense with the tenant before the rent is withheld and the repairs are made. If the tenant fails to prove one or more elements of a repair and deduct defense, it may be possible to avoid lease cancellation by convincing the court that he acted in good faith.

g. Equitable Discretion of Court or ‘‘Judicial Control’’

A court has the equitable discretion to refuse to cancel a lease for nonpayment of rent in certain circumstances. Ergon, Inc. v. Allen, 593 So. 2d 438 (La. App. 2d Cir. 1992); Housing Authority of Lake Charles v. Minor, 355 So. 2d 271 (La. App. 3d Cir. 1977), writ denied 355 So. 2d 1323 (La. 1978); Metzinger v. Bundrick, 503 So. 2d 666 (La. App. 3d Cir. 1987), writ denied 505 So. 2d 1142 (La. 1987). This equitable discretion is usually exercised in cases where the nonpayment of rent was not willful and where the landlord is immediately made whole. See, Atkinson v. Richeson, 393 So. 2d 801 (La. App. 2d Cir. 1981) (tenant erroneously believed that his wife had paid rent and immediately attempted to cure default upon notice); Housing Authority of Lake Charles, supra (tenant’s employment check bounced, but he immediately attempted to remedy the situation); Edwards v. Standard Oil Co. of La., 144 So. 430 (La. 1932) (rent check unduly delayed in mail); Belvin v. Sikes, 2 So. 2d 65 (La. App. 2d Cir. 1941) (tenant’s good faith reliance on receipt that rent was paid). It is also exercised in cases where the landlord’s acts or omissions have contributed to the delay in receiving the rent. See, e.g. Bordelon v. Bordelon, 434 So. 2d 633 (La. App. 3d Cir. 1983); Silas v. Silas, 399 So. 2d 778 (La. App. 3d Cir. 1981). For more examples of equitable relief against forfeiture for nonpayment of rent, see 31 A.L.R.2d 321; 49 Am. Jur 2d, Landlord & Tenant, Section 1078-80.

4. Good Cause Eviction

a. Notice to Vacate

Due process requires that the notice to vacate specify the grounds for eviction. Flores v. Gondolier, Ltd., 375 So. 2d 400 (La. App. 3d Cir. 1979); Louisiana State Museum v. Mayberry, 348 So. 2d 1274 (La. App. 4th Cir. 1977). In addition, the lease or federal law may govern the contents of a notice to vacate. See e.g., Apollo Plaza Apts. v. Gosev, 599 So. 2d 494 (La. App. 3d Cir. 1992) (notice to vacate did not specify grounds for termination with enough detail to prepare a defense). A notice to vacate which did not contain grounds for eviction would deny the tenant the opportunity to present a defense. The landlord’s proof of grounds for eviction should be limited to those stated in the notice to vacate. Cf. Arbo v. Jankowski, 39 So.2d 458 (Orl. App. 1949).

b. Rule for Possession

If the rule for possession states different grounds for termination, it should be argued that this defect is fatal to a summary eviction action. Cf., Arbo v. Jankowski, 39 So. 2d 458 (Orl. App. 1949).

c. Violations of Lease

Cancellation of leases is not favored in Louisiana. Ergon, Inc. v. Allen, 593 So. 2d 438 (La. App. 2d Cir. 1992). A lease will be dissolved only when it is shown that the landlord is undoubtedly entitled to such cancellation. Housing Authority of Town of Lake Providence v. Burks, 484 So. 2d 1068 (La. App. 2d

Cir. 1986); Wahlder v. Osborne, 417 So. 2d 71, 73 (La. App. 3d Cir. 1982); Atkinson v. Richeson, 393 So. 2d 654 (La. App. 1st Cir. 1978), rev'd on other grounds, 367 So. 2d 773 (La. 1979). It should be argued that a lease should not be canceled unless the violations of the terms of the lease are material and important. See, e.g., Carriere v. Bank of Louisiana, 702 So.2d 648 (La. 1996); Lillard v. Hulbert, 9 So. 2d 852 (La. App. 1st Cir. 1942), (overruled on other grounds); Bodman, Murrell & Webb v. Acacia Found. of LSU, 246 So. 2d 323 (La. App. 1st Cir. 1971).

d. Good Cause

Some federally subsidized tenants can only be evicted for ''good cause''. See, e.g., 24 C.F.R. 966 et. seq; 42 U.S.C. Section 1437f (d) (l) (B) (ii); 7 C.F.R. § 1930, Subpt C, Exh. B.8 The Louisiana appellate courts have not defined what constitutes ''good cause'' for the eviction of a federally subsidized tenant. It should be argued that an isolated act of minor misconduct will not forfeit a lease. See 24 C.F.R. § 966.4; 24 C.F.R. § 247.3(c); 24 C.F.R. § 982.310 (d).

e. Equitable Discretion or ''Judicial Control''

Evictions are subject to judicial control and may be denied even if a lease violation exists. Carriere v. Bank of Louisiana, 702 So.2d 648 (La. 1996); Newport-Nichols Enterprises v. Grimes, Austin & Stark, Inc., 463 So. 2d 111 (La. App. 3d Cir. 1985) (failure to obtain insurance).

f. Rectification Clause

A lease may allow a tenant to cure a default or lease violation after notice by the landlord. In such cases, failure to allow rectification would defeat the eviction. See, Shell Oil v. Siddiqui, 722 So.2d 1197 (5th Cir. 1998); Raintree Court Apts. v. Bailey, No. 98-C- 1138 (La. App. 5th Cir. 1998).

g. Res Judicata and Issue Preclusion

Res judicata and issue preclusion apply to eviction lawsuits.9 Avenue Plaza LLC v. Falgoust, 676 So.2d 1077 (La. 1996); Housing Authority of New Orleans v. Riley, 691 So.2d 256 (La. App. 4th Cir. 1997). If a tenant wins an eviction for a lease violation, all causes of action existing at the time of the final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action. La. R. S. 13:4231 (2).

G. OTHER EVICTION RELATED ISSUES

1. Suit for Money and Eviction

Money for damages or rent are not recoverable in a summary proceeding instituted by a rule for possession. Friedman v. Hofchar, Inc., 424 So. 2d 496, 499 (La. App. 5th Cir. 1982), writ denied 430 So. 2d 74 (La. 1983); Himbola Manor Apartments v. Allen , 315 So. 2d 790 (La. App. 3d Cir. 1975); Manor v. Hall, 263 So. 2d 22 (La. 1972). In addition, service of process by tacking does not subject a tenant to the re-quisite personal jurisdiction for entry of a money judgment. Friedman, supra at 499-500.

2. Landlord's Sale of Property

A lease does not bind or affect third parties unless (1) it is filed for registry in the office of the parish recorder for the parish where the immovable is located, La. Rev. Stat. 9:2721, or (2) assumed in the act of sale or purchase agreement. Restaurant Indigo v. Thompson, 733 So.2d 1271 (La. App. 4th Cir. 1999); Stanley v. Orkin Exterminating Co., Inc., 360 So.2d 225 (La. App. 1st Cir. 1978). However, the original landlord is bound by the lease obligations even if he sells the property to a third party and is monetarily liable to a tenant who is evicted by a new owner prior to the expiration of the lease. Cf. Caballero Planting Co., Inc. v. Hymel, 713 So.2d 1277 (La. App. 1st Cir. 1998), writ denied High Plains Fuel Corp. v. Carto International Trading, Inc., 640 So.2d 609 (La. App. 1st Cir. 1994) writ denied 646 So.2d 402.

3. Reconduction of Lease

A ‘‘reconducted lease’’ is a continuation of the lease under the same terms, except that the fixed term in the old lease is voided and the reconducted lease is considered to be month-to-month. La. Civ. Code arts. 2685, 2689; Mays v. Alley, 599 So. 2d 459 (La. App. 2d Cir. 1992); Baronne Street, Ltd. v. Pisano, 526 So. 2d 345 (La. App. 4th Cir. 1988); Misse v. Dronet, 493 So. 2d 271 (La. App. 3d Cir. 1986); King Plaza Inc. v. Richter, 303 So. 2d 504 (La. App. 2d Cir. 1974), writ denied 307 So. 2d 370 (La. 1975). Legal reconduction takes place when a fixed term lease expires, without opposition. See, Governor Claiborne Apartments, Inc. v. Attaldo, 235 So. 2d 574 (La. 1970).

The presumption of reconduction (when the lessee remains in possession of the premises beyond the terms of the lease) is not to be used to force a contract on parties who are unwilling to contract. Its purpose is merely to establish a rule of evidence, or presumption, as to intention when contrary intent has not been expressed. Therefore, any intention not to renew the lease on the same terms defeats reconduction. Misse v. Dronet, 493 So. 2d 271 (La. App. 3d Cir. 1986). For example, no reconduction takes place where the tenant and landlord negotiate for a new lease prior to the expiration of the old lease, and such negotiations involve terms which differ substantially from the old lease. Divincenti v. Redondo, 486 So. 2d 959 (La. App. 1st Cir. 1986).

4. Unpaid Rent and Attorney Fees

La. Rev. Stat. 9:3534 (A) authorizes the award of attorney fees against a tenant in a suit for rent due under an oral lease. An incorrect statement of the amount due may be a defense to the attorney fee claim. Cf. Dutel v. Succession of Touzet, 649 So.2d 1084 (La. App. 4th Cir. 1995). A landlord has a duty to mitigate damages when a tenant prematurely terminates a lease. La. Civ. Code art. 2002; La. R.S. 9:3260; Easterling v. Halter Marine, Inc., 470 So.2d 221 (La. App. 4th Cir. 1985).

LOCKOUTS AND UTILITY TERMINATIONS

In Louisiana, a landlord can only evict a tenant through judicial process. Richard v. Broussard, 495 So.2d 1291, n.1 at 1293 (La. 1986). Lock-outs, removal of the tenant’s property, utility terminations or otherwise rendering the premises uninhabitable or inaccessible, are prohibited. The landlord cannot disturb the possession of the tenant in any way without first resorting to the judicial process. Weber v. McMilian, 285 So. 2d 349, 351 (La. App. 4th Cir. 1973), writ denied 288 So. 2d 357 (La. 1974).

A tenant can enjoin or recover damages for a landlord’s nonjudicial eviction or termination of utility services prior to a final eviction judgment. See, Kite v. Gus Kaplan, Inc., 708 So.2d 473 (La. App. 3d Cir. 1998); Gennings v. Newton, 567 So. 2d 637 (La. App. 4th Cir. 1990); Weber v. Bon March

Pharmacy, 378 So. 2d 520 (La. App. 4th Cir. 1979), writ denied 381 So. 2d 1220 (La. 1980); Vogt v. Jannarelli, 198 So. 421 (Orl. App. 1940). Failure to comply with the statutory procedures for judicial eviction constitutes wrongful eviction and subjects the landlord to damages. White v. Board of Supervisors of Southern University, 365 So. 2d 583 (La. App. 1st Cir. 1978) (lock-out); Buchanan v. Daspit, 245 So. 2d 506 (La. App. 3d Cir. 1971) (illegal entry and removal of property); Robinson v. Bonhaye, 195 So. 365 (Orl. App. 1940) (removal of windows and doors).

Even if the rent is overdue, a landlord cannot exclude the tenant from the apartment or terminate utilities without resort to the judicial process. Holmes v. DiLeo, 184 So. 356 (Orl. App. 1938); Vogt v. Jannarelli, 198 So. 421 (Orl. App. 1940).

Self-help or nonjudicial eviction is permissible only if the landlord can prove that the tenant abandoned the premises. Ringham v. Computerage of New Orleans, Inc., 539 So. 2d 864 (La. App. 4th Cir. 1989) (tenant having loaded the contents of part of the leased premises onto a moving van, and moving the contents from the remainder of the premises amounted to abandonment of the premises); Porter v. Johnson, 369 So. 2d 1141, (La. App. 1979), writ denied 371 So. 2d 615 (where various items of considerable value were left at a leased camp, there was no abandonment); Bunel of New Orleans, lnc. v. Cigali, 348 So. 2d 993 (La. App. 4th Cir. 1977), cert. den., 350 So. 2d 1210 (La. 1977) (where leased premises were empty and there was no response to the landlord's notices, the landlord could assume the premises were abandoned).

Damages for wrongful eviction may be recoverable even if a landlord executes an eviction judgment that is subsequently reversed on devolutive appeal. See, e.g., Mangelle v. Abadie, 19 So. 670 (La. 1896); New Orleans Hat Attack, Inc. v. N.Y. Life Insurance Co., 665 So.2d 1186 (La. App. 4th Cir. 1995). Damages for wrongful eviction may include mental anguish, humiliation, embarrassment, inconvenience, loss or detention of personal property, physical suffering, or loss of use of the apartment. See, e.g., Kite v. Gus Kaplan, Inc., 708 So.2d 473 (La. App. 3d Cir. 1998) ; Gennings v. Newton, 567 So.2d 637 (La. App. 4th Cir. 1990); Navratil v. Smart, 400 So. 2d 268 (La. App. 1st Cir. 1981), writ denied 405 So.2d 320 (La.1981). Tenants with fixed term leases, and federally subsidized tenants could be entitled to large damage awards for wrongful evictions. For example, a tenant with a fixed term lease, who has made leasehold improvements may be entitled to damages in the amount of the value of the improvements, pro rated over the remainder of the lease term. See, e.g. Provenzano v. Populis, 428 So. 2d 556 (La. App. 4th Cir. 1983); Leake v. Hardie, 245 So. 2d 729 (La. App. 4th Cir. 1971); Knapp v. Guerin, 81 So. 302 (La. 1919). A federally subsidized tenant should be entitled to damages in the amount of the rental subsidy (or perhaps the difference between his subsidized rent and the actual nonsubsidized rent, if greater) from the date of the wrongful eviction until he is actually restored to subsidized housing. See, Goler v. Metropolitan Apartments, Inc., 260 S.E. 2d 146 (N.C. App. 1979), cert. denied 265 S.E. 2d 395 (N.C. 1980). Each person in the household could have a cause of action for damages. Cf. Pizanne v. A.V.Dufor, 112 So. 2d 733 (Orl. App. 1959).

In New Orleans, tenants may be entitled to notice of a landlord's termination of the landlord's water account under the consent judgment in the class action, Mathieu v. Brehm, U.S.D.C. No. 74-1521 (E.D. La. 1975). The Sewerage & Water Board may be liable for damages if it fails to give the required notice.

TENANT'S LEASE CANCELLATION RIGHTS

Generally, absent contrary agreement, a month-to-month tenant may cancel his lease by giving the landlord written notice 10 days prior to the end of the current rental month. La. Code Civ. 2686. Tenants

with fixed term leases may only cancel for reasons provided in the lease, Civil Code or other applicable laws. Lease cancellation is not favored in Louisiana and is subject to judicial control. This means that a canceling tenant runs the risk that his lease termination may ultimately be held invalid by a judge and thereby subject him to liability for rent.

Grounds for a tenant to cancel his lease may include:

-- Landlord's failure to maintain the apartment in a habitable condition. Freeman v. G.T.S. Corp., 363 So.2d 1247 (La. App. 4th Cir. 1978).
-- Landlord's failure to maintain tenant in peaceable possession. Essen Development v. Marr, 687 So.2d 98 (La. App. 1st Cir. 1995) (other tenant's barking dog rendered premises uninhabitable).
-- Landlord's substantial violation of lease. La. Civ. Code art. 2729.
-- Fraudulent misrepresentations about neighborhood safety. Borne v. Edwards, 612 So.2d 219 (La. App. 4th Cir. 1992)
-- Destruction of premises by fire or flood.
-- Verbal agreement (despite written term lease) allowing tenant to cancel at any time. Harper v. Gorman, 694 So.2d 1094 (La. App. 5th Cir. 1997).
-- Certain military orders to relocate. La. R.S. 9:3261; 50 U.S.C. §500.
-- Tenant's disability which requires early termination. Samuelson v. Mid-Atlantic Realty Co., 947 F. Supp. 756 (D. Del. 1996). Early termination may be an appropriate remedy for other violations of the Fair Housing Act.
-- Some federally subsidized housing programs may allow early termination for various grounds, e.g., loss of job, severe illness, victim of domestic violence. See e.g., 7 C.F.R. §1930,Subpt C, Exh. B, Pt. VIII, D 20.

REPAIR AND DEDUCT: CIVIL CODE ARTICLE 2694

A. USES

The Louisiana Civil Code provides that if the landlord does not make necessary repairs to the premises after his tenant has called upon him to do so, the tenant can make the repairs himself and deduct their cost from the rent due. La. Civ. Code art. 2694. The repair and deduct provision may be used by tenant:

-- to effectuate necessary repairs to the leased premises;
-- as an affirmative defense to an eviction for non-payment of rent. Lake Forest, Inc. v. Katz & Besthoff No. 9, Inc. , 391 So. 2d 1286 (La. App. 4th Cir.1980); Cameron v. Krantz, 299 So. 2d 919 (La. App. 3d Cir. 1974); Evans v. Does, 283 So. 2d 804, 807 (La. App. 2d Cir. 1973); Leggi-- v. Manion, 172 So. 2d 748 (La. App. 4th Cir. 1965);
-- as a defense or set-off to an ordinary action for rent. Brignac v. Boisdore, 288 So. 2d 31 (La. 1973) aff'g 272 So. 2d 463 (La. App. 4th Cir. 1973); Degrey v. Fox, 205 So. 2d 849 (La. App. 4th Cir. 1968)

It is imperative that the tenant strictly comply with the requirements of article 2694 in order to utilize the above remedies and defenses.

B. CHECKLIST OF REQUIREMENTS OF ARTICLE 2694

Article 2694 of the Louisiana Civil Code states: If the lessor does not make the necessary repairs in the manner required in the preceding article, the lessee may call on him to make them. If he refuses or neglects to make them, the lessee may himself cause them to be made, and deduct the price from the rent due, on proving that the repairs were indispensable, and that the price which he has paid was just and reasonable.

In summary, the requirements for the use of the ‘‘repair and deduct’’ remedy or defense are:

> (1) the repairs must be those that the landlord was obligated to make; (2) the tenant must call on the landlord to make repairs;
> (3) the landlord must refuse or fail to make these repairs after said notice and demand;
> (4) the tenant must then make the repairs;
> (5) the deduction of the cost of the repair must be from the rent due;
> (6) proof that the repairs were indispensable;
> (7) proof that the price paid for the repairs was just and reasonable.

Although the Code specifically permits the tenant to make repairs first and then deduct the cost, the Louisiana Supreme Court has held that a tenant may reverse the order of these actions. Rhodes v. Jackson, 109 So. 46 (La. 1926). The normal repair and deduct remedy would be of limited value to tenants with minimal excess cash if the law required them to perform and pay for the repairs before subtracting the cost from their rent. Once the landlord has refused or neglected to correct a defect, the tenant may begin to withhold rent in anticipation of the expense of repair. Rhodes, supra. The tenant must intend to devote the sums withheld to the repair of the premises, and he must begin to remedy the defect within a reasonable time. Leggio v. Manion, 172 So. 2d 748 (La. App 4th Cir. 1965); New Hope Gardens, Ltd v. Lattin, 530 So.2d 1207 (La. App. 2d Cir. 1988).

C. ANALYSIS OF REQUIREMENTS OF ARTICLE 2694

1. Repairs Subject to Article 2694

a. Landlord’s Repair Obligations

It is difficult to determine what repairs may be made by the tenant pursuant to Article 2694. Civil Code article 2694 refers to the ‘‘necessary repairs required in the preceding article.’’ Article 2693 states:

The lessor is bound to deliver the thing in good condition and free from any repairs. He ought to make, during the continuance of the lease, all the repairs which may accidentally become necessary; except those which the tenant is bound to make, as hereafter directed. The other codal articles on the landlord’s and tenant’s repair obligations are articles 2692, 2695, 2715-17. Law review commentators have concluded that Article 2694 should apply to the following categories of repairs:

> (1) all major repairs ordinarily made by the landlord. See La. Civ. Code arts. 2692, 2695.
> (2) all minor repairs occasioned by unforeseen events or decay. La. Civ. Code art. 2717.
> (3) all minor repairs, not caused by the fault of the tenant, which are indispensable to full enjoyment of the premises for the intended purpose. La. Civ. Code arts. 2692-93.

See Uddo & Riley, Protecting the Tenant’s Rights in Louisiana - A Second Look at the Civil Code With Emphasis on Article 2694, 23 Loy. L. Rev. 921, 948-49 (1977). It is arguable that any repair covered by

the above categories is the obligation of the landlord, unless otherwise stipulated by the contract. LeBrum v. Hill, 452 So. 2d 118 (La. App. 3d. Cir. 1984).

One should argue that the repairs designated as the obligation of the tenant in article 2716 are exclusive and therefore should be strictly construed. See, e.g. Brunies v. Police Jury of Parish of Jefferson, 110 So. 2d 732, 735 (La. 1959); White v. Juge , 147 So. 72, 73 (La. 1933); Washington v. Rosen, 165 So. 473 (Orl. App. 1936). However, be advised that there is also case authority which suggests that the landlord's responsibility for minor defects should be limited. See generally, Comment, Repairs of Leased Premises in Louisiana, 23 La. L. Rev. 458, 460-62 (1963). If possible, one should present any evidence which shows how the particular defect interfered with the ''full enjoyment of the premises for the intended purpose.'' Clearly, ''repair and deduct'' should not be attempted if the repair is an express obligation of the tenant under article 2716, unless excepted by statute or contract. For example, repair of the plastering of the lower part of an interior wall would be an express obligation of the tenant under article 2716. However, if the damage was caused by the overflow of a commode, it may be the obligation of the landlord to repair under articles 2717 or 2719. See, e.g. Payne v. James, 12 So. 492 (La. 1893). Also, ''repair and deduct'' should not be attempted if the damage was caused by the tenant's negligence. La. Civ. Code arts. 2721-23; cf. Hebert v. Neyrey, 432 So. 2d 396 (La. App. 1st Cir. 1983), rev'd 445 So. 2d 1165 (La. 1984).

b. Contractual Modification of Repair Obligations

It is fundamental that a landlord and tenant can broaden or restrict their respective obligations by agreement. Brunies v. Police Jury of Parish of Jefferson, 110 So. 2d 732 (La. 1959); Bice v. Pennsylvania Millers Mutual Insurance Co., 188 So. 2d 502, 506 (La. App. 3d Cir. 1966). Hence, a landlord could greatly limit a tenant's Article 2694 remedy by contractually shifting the obligations for most repairs to the tenant.

There are some methods for circumventing contracts which purport to relieve the landlord of his repair obligations under the Civil Code. First, it must be emphasized that it is the landlord's duty to deliver the premises in good condition. La. Civ. Code art. 2693. If possible, argue that the defect existed at the commencement of the lease, and that the contractual clause concerning repair obligations is not applicable. See, e.g. Houma Oil Co. Inc. v. McKey , 395 So. 2d 828 (La. App. 1st Cir. 1981), writ denied 401 So. 2d 356 (La. 1981); Barrow v. Culver Bros. Garage, 78 So. 2d 69 (La. App. 2d Cir. 1955); Vignes v. Barbara, 5 So. 2d 656 (Orl. App. 1942). The tenant is not responsible for repairs that were necessary prior to the inception of the lease. Wolf v. Walker, 342 So. 2d 1122, 1123 (La. App. 4th Cir. 1976).

In addition, a lease provision requiring the tenant to make all necessary repairs is not a valid disclaimer of the landlord's statutory warranty obligation to the tenant against all vices and defects of the leased property which may prevent its use. Pylate v. Inabet, 458 So. 2d 1378 (La. App. 2d Cir. 1984) (defective sewage system is covered by landlord's obligation).

Also, it should be remembered that the burden of proving such a contract is on the landlord, and that the courts are generally willing to strictly construe any contract which modifies codal obligations and shifts severely onerous repair obligations to the tenant. See, e.g., Clofort v. Matmoor, Inc., 370 So. 2d 1305 (La. App. 4th Cir. 1979); see also Wolf, supra; Brunies, supra . If you can defeat the contract, the Civil Code will govern the repair duties of the landlord and tenant. Also, note that an alleged waiver of

tenant's rights under articles 2693-95 must be brought to the tenant's attention, or explained to him. See Equilease Corporation v. Hill, 290 So. 2d 423 (La. App. 4th Cir. 1974).

The courts have strictly construed contracts which modify the basic codal obligations relative to the contract of lease. Law review commentators have also suggested that attorneys for indigent tenants attempt to use Article 7 of the Civil Code to void contracts which shift all repair obligations to the tenant. Uddo & Riley, supra at 952-53. It is noted that this approach has historically been rejected in cases involving commercial leases. Louisiana National Leasing Corporation v. ADF Services, Inc., 377 So. 2d 92 (La. 1979); Capital City Leasing Corp. v. Hill, 394 So. 2d 1264 (La. App. 1st Cir. 1981), remanded 404 So. 2d 935 (La. 1981); but cf. Hebert v. Neyrey, 432 So. 2d 396 (La. App. 1st Cir. 1983), rev'd 445 So. 2d 1165 (La. 1984). Nonetheless, it is possible that the courts will invoke Article 7 to void waivers of codal repair warranties relative to residential leases because such waivers have generally been held to be contrary to the public good. See e.g., Green v. Superior Court, 517 P. 2d 1168 (Cal. 1974); Boston Housing Authority v. Hemingway, 293 N.E. 2d 831, 843 (Mass. 1973).

Where a landlord fails to accomplish repairs specifically set out in the lease provision, the tenant is entitled to have the repairs made himself and deduct the price from the rent due.

c. Specific Rulings

Here is a list of some court rulings on the landlord's and tenant's obligations for various repairs. This list is only illustrative. Each case depends on its individual facts.

Repairs Held to be Landlord's Obligation

Shelton v. Masur, 102 So. 813 (La. 1925) (rotten steps at back of residence); Breen v. Walters, 91 So. 50 (La. 1922) (balustrade); Plescia v. LeRoy, 86 So. 824 (La. 1921) (plastering of ceiling); Boutte v. New Orleans Terminal Co., 72 So. 513 (La. 1916) (balcony/ balustrade); Washington v. Rosen, 165 So. 473 (Orl. App. 1936) (sink); Bost v. Provenza , 47 So. 2d 437 (La. App. 2d Cir. 1950) (porch floor); Wilcox v. Lehman, 12 So. 2d 641 (Orl. App. 1943) (water faucet); Whittington v. Hopfensitz 321 So. 2d 836 (La. App. 1st Cir. 1975) (roof); Mecca Realty, Inc. v. New Orleans Health Corp., 389 So. 2d 403 (La. App. 4th Cir. 1980) (electrical service); Wexler v. Occhipinti 378 So. 2d 1073 (La. App. 4th Cir. 1979), writ denied 381 So. 2d 1232 (La. 1980) (walkway approach to door); cf. Hebert v. Neyrey, 432 So. 2d 396 (La. App. 1st Cir. 1983), rev'd 445 So. 2d 1165 (La. 1984) (water pipes).

Repairs Held to be Tenant's Obligation:

The French Eighth v. Watts, 514 So. 2d 553 (La. App 4th Cir. 1987) (excess water bills resulting from running toilet)); Snelp v. National Sun Corp., 333 F. 2d 431 (5th Cir. 1964), cert. denied 85 S.Ct. 439, 379 U.S. 945 (doors - personal injury suit; Wilson v. U.S., 434 F. Supp. 72 (E.D. La. 1977) (windows); Stubbs v. Lee, 368 So. 2d 1174 (La. App. 3d Cir. 1979) (minor repair of tightening screws to Murphy bed - personal injury suit).

2. Adequate Notice And Demand on Landlord

Proper notice and demand for the necessary repairs is absolutely essential to the perfection of a remedy or defense under article 2694. See, Larsen v. Otalvano , 391 So. 2d 1378 (La. App. 4th Cir. 1980); Uddo

& Ridley, supra cases cited in n.127 at p. 947. The problem of ‘‘adequate notice’’ should be handled carefully because the jurisprudence has not been clear.

If there is a written lease provision on the method of notice, that provision will govern the issue of whether adequate notice was given. See Brignac v. Boisdore , 272 So. 2d 463, 465 (La. App. 4th Cir. 1973), aff’d 288 So. 2d 31 (La. 1974). For example, in Calderon v. Johnson, 453 So. 2d 615 (La. App. 1st Cir. 1984), the court held that although the landlord failed to receive notice of the repairs made by the tenant, that the tenant complied with the terms of the lease by mailing the notice, under a term of the lease stating that ‘‘notices shall be served by mailing of such notice.’’

In the absence of a written lease provision or other agreement, one must decide on (1) the type of notice, (2) whom to notify, and (3) the length of delay before conducting repairs. Apparently, oral or written notice can be sufficient. See, Rhodes v. Jackson , 109 So. 46, 48 (La. 1926); Freeman v. G.T.S. Corp., 363 So. 2d 1247 (La. App. 4th Cir. 1978); Dikert v. Ruiz, 231 So. 2d 633 (La. App. 4th Cir. 1970). However, there can be serious proof problems with oral notice. The tenant has the burden of proving adequate notice and demand. Contradictory testimony by the landlord and tenant on the issue of notice, where the credibility of neither is attacked, would require a decision in favor of the landlord. Johnson v. Johnson, 296 So. 2d 470, 471-72 (La. App. 2d Cir. 1974), writ refused 300 So. 2d 183 (1974); May v. Schepis, 147 So. 717 (La. App. 2d Cir. 1933).

Hence, one should use a method of notice which will insure independent evidence that notice was given. Written notice by the tenant’s attorney is certainly one method. See Dickert v. Ruiz, 231 So. 2d 633 (La. App. 4th Cir. 1970). In using written notice through certified and regular mail, one should remember that competent evidence of the mailing and receipt of the letter will be required. See, e.g. DiRosa v. Bosworth, 225 So. 2d 42 (La. App. 4th Cir. 1969), writ refused 227 So. 2d 591 (La. 1969).

Correction orders issued by a city’s division of housing improvements do not satisfy the tenant’s contractual obligation to give the landlord written notice of defects in order to recover the cost of repairs. Lee v. Badon, 487 So. 2d 118 (La. App. 4th Cir. 1986) The tenant should attempt to make a demand for repairs directly on the landlord. There are several cases which seem to require direct contact with the landlord. Teekell v. Drewett, 103 So. 2d 525 (La. App. 2d Cir. 1958); Ellis v. Brenner, 34 So. 2d 633 (La. App. 2d Cir. 1948). To avoid the harsh consequences of Teekell and Ellis, the tenant should pursue all available methods of directly placing the landlord in default. There may be some duty to investigate alternative methods of giving the landlord direct notice of the required repairs. See, e.g. Giraud v. Clark, 354 So. 2d 752 (La. App. 4th Cir. 1978). Teekell and Ellis exacerbate the problem of notifying an absent or inaccessible landlord. The better rule is that the tenant be required to take reasonable steps to notify the landlord. See, Barrow v. Culver Bros. Garage, 78 So. 2d 69 (La. App. 2d Cir. 1955); Uddo & Riley, supra at 947.

It should be noted that many rent collection agents only have a limited mandate (or power of attorney) from the landlord. This limited mandate may only authorize the agent to collect rent, and not to make repairs. The agent may not even forward a demand for repairs to the landlord. To be on the safe side, one should contact both the agent and landlord. In a case where only the agent was notified, it can be argued that notice to the agent constituted notice to the principal. Office Equipment, Inc. v. Hyde, 145 So. 2d 86 (La. App. 4th Cir. 1962); see also Freeman v. G.T.S. Corp., supra at 1248-49.

Article 2694 does not indicate how long a tenant must wait before commencing repairs after proper demand on the landlord. However, it is clear that the landlord must be given a reasonable period in

which to make the repairs. New Hope Gardens, Ltd. v. Lattin, 530 So. 2d 1207 (La. App. 2d Cir. 1988); Davilla v. Jones, supra; Uddo & Ridley supra at 948; cf., Leggio v. Manion, 172 So. 2d 748, 750 (La. App. 4th Cir. 1965). The determination of ‘‘reasonable period’’ is essentially factual and will depend on the individual circumstances of each case. Presumably, a ‘‘reasonable period’’ would vary according to the nature of the defect. See, e.g. Barrow v. Culver Bros. Garage, 78 So. 2d 69 (La. App. 2d Cir. 1955), Uddo & Ridley, supra at 948.

In Davilla v. Jones, the Louisiana Supreme Court found that a commercial landlord's failure to repair substantial water leakage in the roof and walls, within 2 weeks of the tenant's demand, did not justify the use of the repair and deduct remedy. The court found that the high cost of repairs ($30,000+), and the business need to obtain additional bids, justified the landlord's delay in making the repairs. As such, there is a danger that the lower courts will interpret Davilla to require a waiting period of more than two (2) weeks before a tenant can make the repairs under article 2694.

3. Deduction From Rent Due

Deduction for repairs can only be made from rent due. La. Civ. Code art. 2694 . Deductions are clearly limited to rent due after the landlord was properly put in default. Mullen v. Kerlec, 40 So. 46 (La. 1905). See also, Rhodes v. Jackson, 109 So. 46 (La. 1926. If the tenant has a long term lease, it can be argued that he has a right to make deductions for repairs up to the amount due under the lease. Heirs of Merilh v. Pan American Films, 200 So. 2d 398, 402 (La. App. 4th Cir. 1967); writ refused, 203 So. 2d 88 (La. 1967); Lorenzon v. Woods, 1 McGloin 373 (Orl App. 1881); see also Cameron v. Krantz, 299 So. 2d 919, 923 (La. App. 3d Cir. 1974).

A tenant with a month-to-month lease is probably limited to making repairs which do not exceed the monthly rent. Evan v. Does, 283 So. 2d 804, 808 (La. App. 2d Cir. 1973). The issue of repair costs greater than the monthly rent has not been directly addressed by the other Circuit Courts of Appeal. However, decisions by the Fourth Circuit can be construed to limit allowable deductions under Article 2694 to the amount due under the current lease, i.e., one month. See Heirs of Merilh v. Pan American Films, 200 So. 2d 398 (La. App. 4th Cir. 1967); Rumfola v. Civiletto, 123 So. 153 (Orl. App. 1929); Uddo & Ridley, supra at 950-51. This limitation presents a serious problem to the indigent tenant because (1) many repairs exceed the monthly rental, and (2) the landlord could respond to the tenant's use of article 2694 with a 10 day notice to vacate. The month-to-month tenant who uses article 2694 to make necessary repairs in excess of the monthly rent, incurs a serious risk of not being reimbursed for his repairs. Any litigation approaches to this problem are experimental and, almost always, not worth the expense and risk to a month-to-month tenant.

One approach (undoubtedly impractical for most tenants) would be (1) to argue that a tenant is entitled to rent deduction for the entire tenancy subsequent to putting the landlord in default, and (2) to keep the tenant in possession through suspensive appeals. Article 2694 allows deduction from rent due (and to become due). This language is general and could be interpreted to mean any rent due, not just the rent due during the month in which the landlord was put in default. See Wolf v. Walker, supra, Degrey v. Fox, 205 So. 2d 849 (La. App. 4th Cir. 1968); Leggio v. Manion, 172 So. 2d 748 (La. App. 4th Cir. 1965). But contra Heirs or Merilh v. Pan American Films, supra. This interpretation might allow a tenant to offset repair costs against rent becoming due during the pendency of an appeal from an eviction judgment. A tenant's obligation to pay rent continues during the pendency of a suspensive appeal. See Sarpy v. Morgan, 426 So. 2d 293 (La. App. 4th Cir. 1983). If the rent due for the remainder of the term is not adequate to compensate the tenant, he may be able to bring an action for damages in the amount of

the difference between the cost of repair and the rent. Davis v. McConnell, 146 So. 54 (La. App. 2d Cir. 1933).

4. Proof That Repairs Were Indispensable And That Price Was Reasonable

Finally, the tenant must be able to prove (1) that the repairs made were indispensable, and (2) that the price of the repairs were just and reasonable. ‘‘Indispensable’’ should be interpreted to mean that the repairs were necessary to correct the defect. The ‘‘necessity of the repairs’’ should be established through the testimony of a qualified person. See, e.g. Scott v. Davis, 56 So. 2d 187 (Orl. App. 1952) (production of receipted bill for automobile repairs, allegedly necessitated as the result of a collision, is not alone sufficient proof; there must be testimony); Ermis v. Government Employees Insurance Co, 305 So. 2d 620 (La. App. 4th Cir. 1975) (damage claim based on bill for medical expenses from a clinic was not proven where no doctor from the clinic testified); Keever v. Knighten, 532 So. 2d 826, writ denied 533 So. 2d 381 (La. App. 4th Cir. 1988) (repair of air conditioner in law offices did not justify tenant’s refusal to pay rent). Am Jur. Proof of Facts: Damages, 3:491, 554-58 (1959).

How much evidence is required to prove that the price of the repairs was just and reasonable? There are contradictory judicial pronouncements on the question of sufficiency of evidence.

First, the actual price of the repairs should be provable by testimony of payment, corroborated by introduction into evidence of the bills paid, and identification of them as expenses incurred because of the landlord’s default. See, e.g. Dickert v. Ruiz, 231 So. 3d 633 (La. App. 4th Cir. 1970); Trinity Universal Insurance Company v. Normand, 220 So. 2d 583, 586 (La. App. 3d Cir. 1969). But see Ducote v. Allstate Insurance Company, 242 So. 2d 103 , 107 (La. App. 1st Cir. 1970), writ refused 243 So. 2d 532 (La. 1971) and Vezinat v. Marix, 217 So. 2d 416, 421 (La. App. 1st Cir. 1968) where it was held that a party’s testimony alone is insufficient to establish a claim for damages. See also Freeman v. G.T.S. Corp., 363 So. 2d 1247, 1251 (La. App. 4th Cir. 1978). However, the tenant must also prove that the price paid for repairs was just and reasonable. The reasonableness of the price should be proved through the testimony of a person qualified and knowledgeable in the assessment of the values of repairs. See, e.g., Ducote v. Allstate Insurance Co., supra ; Vezinat v. Marix, supra. It may be difficult, if not impossible, to obtain this quality of evidence for an eviction defense. In that event, the only alternative is to produce the best available evidence or secure a continuance. See, Coleman v. Victor, 326 So. 2d 344; 348-49 (La. 1976), which suggests that the Louisiana Supreme Court may be willing to reject inflexible evidentiary rules commonly used by some Courts of Appeal. See Dickert v. Ruiz , supra; Lambert v. Allstate Insurance Company, 195 So. 2d 698, 700-01 (La. App. 1st Cir. 1967).

If a repairman cannot be obtained for the trial, you should attempt to introduce other competent testimony on the nature of the defects, the amount of time spent on the repairs, and the costs of the labor and materials. You can attempt to introduce any estimates on the repair work, however, note that these estimates are ordinarily inadmissible as hearsay. Thompson v. Simmons, 499 So. 2d 517 (La. App. 2d Cir. 1986), writ denied 501 So. 2d 772; Ordonez v. Maryland Casualty Company, 312 So. 2d 875 (La. App. 4th Cir. 1975); Dikert v. Ruiz , supra. Such estimates can probably be admitted without objection in those evictions which are prosecuted by a non-attorney.

Finally, note that a tenant should be able to make a rent deduction for the value of his own labor, if properly proved. See, e.g., Lambert v. Allstate Insurance Company, 195 So. 2d 698 (La. App. 1st Cir. 1967); Kopsco v. Allelo, 32 So. 2d 99 (1st Cir. 1947). Again, the value of the tenant’s own repair work must be supported by competent testimony on the number of hours worked and the monetary value

thereof. Lambert, supra at 700. The tenant should not make a claim greater than the price that a professional would have charged. See, e.g., Kopsco, supra.

E. PLEADING REQUIREMENTS FOR AN ARTICLE 2694 DEFENSE

All of the elements of an Article 2694 defense should be pleaded. Note that several courts have strictly enforced the pleading requirements for an Article 2694 defense. See, e.g. Miami Truck & Motor Leasing Co. v. Dairyman, Inc. , 263 So. 2d 110, 112 (La. App. 1st Cir. 1972); Duchein v. Ben Roumain, Inc. 176 So. 696 (La. App. 1st Cir. 1937).

F. ALTERNATIVE REMEDIES IN THE EVENT OF FAILURE UNDER ARTICLE 2694

1. The Defense of Good Faith

If the tenant fails to prove one or more elements of an Article 2694 defense, it may be possible to avoid cancellation of the lease for nonpayment of rent by convincing the trial court that he acted in good faith. It is well-settled that dissolution of a lease is subject to judicial control and is not favored under the law. Housing Authority of Lake Charles v. Minor, 355 So. 2d 271 (La. App. 3d Cir. 1977), writ refused 355 So. 2d 1323 (La. 1978); Brewer v. Forest Gravel Co., 135 So. 372 (La. 1931); Housing Authority of Town of Lake Providence v. Burks, 486 So. 2d 1068 (La. App. 2d Cir. 1986). See especially Brewer where the tenant was held to have been in good faith in refusing to pay more than he thought was due according to the advice of counsel. Brewer, supra at 373.

2. The Right to Remove Improvements or to Be Reimbursed

Suppose the tenant improperly used article 2694. What are the remedies of a tenant who is evicted before recouping the value of his improvements in rent? The tenant has the right to remove the improvements if it can be done without damaging the thing leased. La. Civ. Code art. 2796; Riggs v. Lawton, 93 So. 2d 543 (La. 1957); Leake v. Hardie, 245 So. 2d 729 (La. App. 4th Cir. 1971); Pylate v. Inabet, 458 So. 2d 1378 (La. App. 2d Cir. 1984). He cannot compel the landlord to reimburse him.

3. Damages

The landlord may be sued for damages for failure to maintain the apartment in habitable condition. See next section.

TENANT DAMAGE CLAIMS

Tenant damage claims may be ex delictu or ex contractu. Potter v. First Federal S & L, 615 So.2d 318 (La. 1993).

A. WARRANTY OF HABITABILITY

A tenant may sue and recover damages from a landlord for violations of the warranty of habitability, i.e., failure to maintain apartment in good condition. See Ganheart v. Executive House Apts., 671 So.2d 525 (La. App. 4th Cir. 1996), writ denied 678 So.2d 554; Gennings v. Newton, 567 So.2d 637 (La. App. 4th Cir. 1990); Smith v. Castro Brothers Corp., 443 So.2d 660 (La. App. 4th Cir. 1983), writ denied 446 So.2d 1229, 1231 (La. 1984). Assumption of risk is not a defense to a warranty of habitability lawsuit.

Smith v. Castro Brothers Corp., supra. Written notice of the defects is not required where the landlord had actual notice. Ganheart, supra. The landlord is obligated to deliver the premises to the tenant in good condition, and free from any repairs. La. Civ. Code art. 2693. Although one appellate court has held that a commercial tenant may waive the warranty of fitness if clear and unequivocal language is used [Pylate v. Inabet, 458 So. 2d 1378 (La. App. 2d Cir. 1984)], courts are very reluctant to find such a waiver. In Moity v. Guillory, 430 So. 2d 1243 (La. App. 1st Cir. 1983), writ denied 437 So. 2d 1148 (La. 1983), the court held that although a tenant accepts leased premises ‘‘as is’’, he is still entitled to the implied warranty of fitness afforded him by law. In some jurisdictions, the warranty of habitability is considered to protect a public interest in decent housing, and the tenant may not waive the warranty. N.Y. Real Prop. Law Section 235(b)2 (Consol. 1984); Berzita v. Gambino, 63 N.J. 460, 308 A. 2d 17 (1973); see also Green v. Superior Court, 517 P.2d 1168 (Cal. 1974); Boston v. Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973).

In Smith, supra the court held that a tenant cannot recover for damages from uninhabitability of leased premises after being properly ordered to leave by the landlord. The Smith holding, that an eviction notice (arguably a ‘‘notice to vacate’’) terminates the landlord’s obligations to the tenant, is incorrect. In Louisiana, a landlord’s obligations continue until there is a final judgment canceling the lease. See e.g., Reed v. Classified Parking System, 324 So. 2d 484, 490 (La. App. 2d Cir. 1975), writ denied 325 So. 2d 791 (La. 1976).

Warranty of habitability actions are maintainable against federally subsidized landlords. See , e.g., National Capital Housing Authority v. Douglas, 333 A. 2d 55, 56 (D.C. 1975); Boston Housing Authority v. Hemingway, 293 N.E. 2d 831, 843 (Mass. 1973). Conventional public housing tenants have the additional remedy of rent abatement. 24 C.F.R.§ 966.4(h). See also, HANO v. Wilson , 503 So.2d 565 (La. App. 4th Cir. 1987). If you intend to prove a housing code violation, a certified copy of the ordinance should be introduced into evidence. Cantelupe v. City of Bossier, 322 So. 2d 344 (La. App. 2d Cir. 1975). For information on proving uninhabitability, see 2 Am. Jur. Proof of Facts 2d 823.

B. PEACEABLE POSSESSION

Failure to maintain a tenant in peaceable possession gives rise to a breach of contract. It may also give rise to a negligence claim if the landlord should have known of the disturbance. La. Civ. Code. art. 2692; Potter v. First Federal S & L, 615 So.2d 318 (La. 1993); Walters v. Greer, 726 So.2d 1094 (La. App. 2d Cir. 1999)(landlord liable for damages). Landlords have an obligation to prevent their other tenants from disturbing a tenant’s peaceable possession. See e.g., Essen Development v. Marr, 687 So.2d 98 (La. App. 1st Cir. 1995).

C. UNFAIR TRADE PRACTICES ACT

The Louisiana Unfair Trade Practices and Consumer Protection Law (LUTP), La. Rev. Stat. 51:1401 et. seq. may be applicable to leasing of residential property. LUTP prohibits ‘‘unfair and deceptive’’ acts or practices in the conduct of any trade or commerce. La. Rev. Stat. 51:1405(A). The definition of ‘‘trade or commerce’’ includes the sale or distribution of any services and any property, corporeal or incorporeal, immovable or movable, and any other article or thing of value. La. Rev. Stat. 51:1402 (9). At a minimum, the victim of an unfair trade practice may recover actual damages and attorney’s fees. Knowing violations of an administrative regulation or court decision, relative to an unfair trade practice, could subject the violator to treble damages.

The Louisiana Office of Consumer Protection has issued regulations which hold that various acts or omissions in connection with the leasing of mobile homes constitute unfair trade practices. LOCP Reg. Section 5005. No other aspects of the leasing transaction have been administratively or judicially declared as unfair trade practices under LUTP. But see, Nash v. LaFontaine, 407 So. 2d 783 (La. App. 4th Cir. 1981).

Louisiana courts have held that interpretations of the federal courts and the Federal Trade Commission relative to 15 U.S.C.§ 45 should be considered to adjudge the scope and application of LUTP. Moore v. Goodyear Tire and Rubber Co., 364 So. 2d 630, 633 (La. App. 2d Cir. 1978); Guste v. Demars, 330 So. 2d 123 (La. App. 1st Cir. 1976). 15 U.S.C.§ 45 has been interpreted to be applicable to various aspects of the leasing transaction. See, e.g. , In the Matter of Hallmark Group Companies, Inc., 84 F.T.C. 1 (1974); LaPeyre v. F.T.C., 366 F. 2d 117 (5th Cir. 1966), aff'g. in part 65 F.T.C. 799. In addition, it should be noted that LUTP is identical or virtually identical to the unfair trade practices laws of many other states. Court decisions of other states on statutes identical, or similar to those of Louisiana are persuasive authority. Fontenot v. New York Life Insurance Co., 357 So. 2d 1185 (La. App. 3d Cir. 1978), writ denied 359 So. 2d 622 (La. 1978). Many states with identical or similar unfair trade practices laws have held them applicable to unfair or deceptive acts committed in the leasing of residential property. See, e.g., Commonwealth v. Monumental Properties. 329 A. 2d 812 (Pa. 1974). Commonwealth v. DeCotis, 316 N. E. 2d 7 48 (Mass. 1994); Commonwealth v. Isaacs, 577 S.W. 2d 617 (Ky. 1979). A practice is unfair when it offends established public policy, and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to customers. F.T.C. v. Sperry Hutchinson Co., 405 U.S. 233 (1972); Moore v. Goodyear Tire and Rubber Co., 364 So. 2d 620 (La. App. 2d Cir. 1978). Other state courts have held a variety of landlord abuses, e.g., retaliatory eviction, violation of warranty of habitability, failure to repair, to be unfair trade practices.

For more examples of the application of unfair trade practice laws to landlord-tenant practices, see R. Blumberg, Application of State Consumer Protection Acts to Landlord- Tenant Practices (FTC 1980); National Consumer Law Center, Unfair and Deceptive Acts and Practices §5.5.2 (4th Ed. 1997). It should be noted that federally subsidized landlords are not exempt from unfair trade practice laws. La. Rev. Stat. 51:1406; York v. Sullivan, 338 N.E. 2d 341 (Mass. 1975). Suit should be filed within one year of the unfair practice since these claims are subject to a one year peremption. D. FEDERAL FAIR DEBT COLLECTION PRACTICES ACT Attorneys or collection agencies who attempt to collect debts for landlords are subject to the Fair Debt Collection Practices Act. See Romea v. Heiberger Associates, 163 F. 3d 111 (2d Cir. 1998)(rent demand notice by attorney as predicate to eviction). Utility shutoffs and lockouts seeking to force a tenant to pay rent allegedly owed may also violate the FDCPA if the action was not taken by the landlord himself.

E. FEDERAL FAIR CREDIT REPORTING ACT

Denial of a lease because of a credit report or a tenant screening report is adverse action under the Fair Credit Reporting Act. See Cotto v. Jenney, 721 F. Supp. 5 (D. Mass. 1989). The tenant must be given notice of the adverse action and an opportunity to dispute inaccurate or incomplete information.

F. INVASION OF PRIVACY AND TRESPASS

A landlord can be liable for unlawful entering of the tenant's apartment. See, Pizanie v. A. V. Dufour, 112 So. 2d 733 (Orl. App. 1959); Lindsey v. Zibilich , 153 So. 341 (Orl. App. 1934).

G. PROPERTY DAMAGE

A tenant may recover damage to personal property which is caused by the landlord's negligence, lease violation, or vices and defects in the premises. Green v. Hodges Stockyard, Inc., 522 So. 2d 435 (La. App. 4th Cir. 1989) (corrosive damage to vending machines caused by a hole on the premises); Wilson v. Pou, 436 So. 2d 599 (La. App. 4th Cir. 1983) (mildew damage due to air conditioning malfunction); Daspit v. Swann, 436 So. 2d 606 (La. App. 1st Cir. 1983) (fire damage due to electrical malfunction).

H. THIRD PARTY CRIMES

A landlord who provides substandard security may be liable for injuries caused by a third party criminal. Veazey v. Elmwood Plantation Associates, 650 So.2d 712 (La. 1994).

HOUSING DISCRIMINATION

A. INTRODUCTION

The federal Fair Housing Act is codified at 42 U.S.C. 3601-3619 and 3631. 3604- 3606 and 3617 contain the substantive prohibitions of the Act. A key provision, 3604(a), makes it unlawful to ''refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.'' 3604(f)(1) also bans handicap discrimination. The phrase, ''otherwise make unavailable or deny'' has been broadly construed to include numerous housing practices unspecified in 3604(a), e.g., redlining, steering, exclusionary zoning, etc. HUD regulations implementing the Act are codified at 24 C.F.R. 100 et seq. The courts must generally defer to HUD's interpretations of the Act. Chevron USA v. National Resources Defense Council, Inc., 467 U.S. 837, 84244 (1984); Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 210 (1972).

42 U.S.C. 1981 and 1982 also outlaw private and public racial discrimination in housing. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). They even apply to housing that is exempt under the Fair Housing Act. The Louisiana Open Housing Act, La. R.S. 51:2601 et seq. also prohibits housing discrimination. It is virtually identical to the FHA. Some advantages to filing in state court under the Open Housing Act would be an automatic lis pendens bar to subsequent eviction lawsuits and avoidance of res judicata and Anti-Injunction Act issues. On the other hand, the Open Housing Act does not have a body of case law interpreting it . Also, the Open Housing Act has an attorney's fee provision that might be interpreted as ''loser pays'' rather than the FHA standard that limits attorney fees to losing plaintiffs whose lawsuits were frivolous.

B. PROPERTIES COVERED BY FAIR HOUSING ACT

1. Dwellings

The Fair Housing Act prohibits discrimination in transactions involving ''dwellings.'' 42 U.S.C. 3602(b). ''Dwelling'' includes any building occupied or intended to be occupied as a residence. The courts have held the following properties, in addition to houses and apartments, to be dwellings:

a. Mobile home parks. United States v. Warwick Mobile Home Estates, 537 F.2d 1148 (4th Cir. 1976).
b. Trailer courts. Stewart v. Furton, 774 F.2d 706 (6th Cir. 1985).

c. Condominiums. Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979).
d. Summer homes. United States v. Columbus Country Club, 915 F.2d 877 (3d Cir. 1990), cert. denied 111 S.Ct. 2797.
e. Motel providing longterm shelter to homeless. Red Bull Associates v. Best Western International, 686 F. Supp. 447 (S.D. N.Y. 1988); but see, Johnson v. Dixon, 786 F. Supp. 1 (D.D.C. 1991).
f. Home for AIDS patients. Baxter v. City of Belleville, Illinois, 720 F. Supp. 720 (S.D. Ill. 1989).
g. Group homes. House Rep. 100-711, p. 24, 100th Cong., 2d Sess. (1988).
h. Shelters and transitional housing. Doe v. City of Butler, Pa., 892 F. 2d 315 (3d Cir. 1989).
i. Timeshares. Louisiana ACORN Fair Housing v. Quarter House, 952 F. Supp. 352 (E.D. La. 1997).

Boarding houses, dormitories and all other facilities whose occupants remain for more than a brief period are presumably covered as ‘‘dwellings’’ under the Act.

2. Exempted Dwellings

a. Owner’s direct sale or rental of his single family home. 3603(b)(1). Note: This exemption only applies to 3604(a), (b), (d)-(f). Also, the exemption has numerous exceptions. See e.g., Dillon v. AFBIC Development Corp., 597 F.2d 556, 561 (5th Cir. 1979). An owner’s broker is not exempt.
b. Owner-occupied buildings with no more than 4 units. 3603(b)(2).
c. Housing for ‘‘older persons’’ as to prohibition against familial discrimination. 3607(b)(2)-(3). Other forms of discrimination are, however, prohibited.
d. Religious organizations’ noncommercial dwellings.
e. Private clubs’ incidental noncommercial lodgings.

A defendant must plead and prove a FHA exemption as an affirmative defense. United States v. Columbus Country Club, 915 F. 2d 877, 885 (3d Cir. 1990), cert. denied 111 S. Ct. 2797. Exemptions are strictly construed. Singleton v. Gendason, 545 F. 2d 1224, 1227 (9th Cir. 1976). Note: A landlord exempted under 3603 is still liable for racial discrimination under 42 U.S.C. 1981-82.

C. PROHIBITED BASES OF DISCRIMINATION

1. Race or color.
2. National origin. Espinoza v. Hillwood Square Mut. Ass’n, 522 F. Supp. 559 (E.D. Va. 1981) (Mexicans); cf. Cutting v. Mazzey, 724 F.2d 259 (1st Cir. 1984) (Italians).
3. Religion.
4. Sex or Sex Harassment
5. Handicap

Every legal services housing advocate should read the July 1999 Clearinghouse Review article, Using Reasonable Accommodations to Preserve Rights of Tenants with Disabilities.10

a. Definition: (1) a physical or mental impairment which substantially limits one or more major life activities; (2) a record of having such impairment, or (3) being regarded as having such an impairment.

Definition is virtually identical to 504 definition. Congress intended interpretations that are consistent with interpretation under 504. Note: List of ‘‘major life activities’’ in 24 C.F.R. 100.201 is not all-inclusive. United States v. Borough of Audobon, 797 F. Supp. 353 (D.N.J. 1991) aff’d 968 F. 2d 14 (3d Cir. 1992).

b. Exceptions: Transvestites and current illegal users of a controlled substance are excepted from the definition of ‘‘handicap.’’ Drug addiction is a ‘‘handicap’’ if not caused by current illegal use.

c. Examples: Covered handicaps include alcoholism, AIDS, high blood pressure, emotional problems, mental illness or retardation, learning disabilities, cancer, epilepsy, cerebral palsy and many disabilities associated with old age. See e.g., Cason v. Rochester Housing Authority, 748 F. Supp. 1002 (W.D. N.Y. 1990) (elderly); Oxford House Inc. v. Town of Babylon, 819 F. Supp. 1179 (E.D. N.Y. 1993)(recovering alcoholics and drug addicts); United States v. Southern Management Corp., 955 F. 2d 914 (4th Cir. 1992) (former addicts).

d. Persons commonly ‘‘regarded as having an impairment’’ are the elderly, former substance abusers and HIV-positive persons.

e. The handicap discrimination provisions also protect persons residing or associating with the handicapped, e.g., parents, children, spouses, roommates, etc.

f. Basic Prohibitions: ‘‘Handicap’’ was added to all FHA prohibitions except 3604(a) and 3604(b). For the handicapped, the 3604(a)-(b) prohibitions are found in 3604(f)(1)-(2) with modifications to allow restriction of occupancy to the handicapped.

g. Modifications Required: Handicapped tenants must be allowed, at their own expense, to make any reasonable modifications necessary for full enjoyment of premises, i.e., the unit, lobbies, main entrances, common areas, etc. 24 C.F.R. 100.201. Landlord does not have absolute right to reject modifications but may condition approval of unit modification on restoration agreement.

h. Accommodation Required: Housing providers must make reasonable accommodations in rules, policies, practices or services necessary to afford handicapped persons ‘‘equal opportunity to use and enjoy a dwelling.’’ This means ‘‘feasible practical modifications’’ and is derived from case law and regulations interpreting 504 of the Rehabilitation Act. Thus, the accommodation must be made unless it imposes an undue financial or administrative burden or requires a fundamental alteration in the nature of the provider’s program.

i. Examples of required accommodations include (1) allowing seeing eye dog for blind tenant, (2) reserving parking place for mobility-impaired tenant, (3) waiving rules to allow handicapped tenant to have nontenant do his laundry.

6. Familial Status

a. Definition: ‘‘Familial status’’ is defined as one or more individuals under the age of 18 living with a parent, a person having legal custody, or the designee of such parent or legal custodian. The definition includes a person who is pregnant or about to obtain custody of a minor.

b. Basic Prohibitions: All FHA prohibitions apply to familial status discrimination subject to the exemption for housing for older persons.

c. Occupancy Standards: 42 U.S.C. 3607(b)(1) allows providers to comply with ‘‘reasonable’’ local, state or federal occupancy standards. HUD has declined to define ‘‘reasonable.’’ A ‘‘totality of circumstances’’ analysis is generally applied to an occupancy standard. A trailer park’s ‘‘3 person per unit’’ and an apartment complex’s one person/one bedroom, two person/two bedroom restrictions have been held to violate the FHA. HUD v. Mountain Side Mobile Estates, FH-FL Rptr. 25,492-93 (HUD Secy 1993); United States v. Badgett, 976 F.2d 1176 (8th Cir. 1992). Badgett referred to HUD’s rule of thumb that occupancy limits of two persons per bedroom are presumptively reasonable. HUD has provided guidance by memorandum that indicates factors which may warrant deviation from the two person per bedroom standard such as size and configuration of the bedroom and unit.

d. Discriminatory Effects: Familial status discrimination may apply to practices that have a disproportionate impact on families with children. Note: This could play a large role in familial status discrimination litigation.

e. Exemption: Housing for ‘‘older persons’’ is exempted from the FHA prohibitions against familial status discrimination. 42 U.S.C. 3607(b)(1)-(3). Detailed HUD regulations on this exemption are found at 24 C.F.R. 100.300.

D. DISCRIMINATORY PRACTICES

1. Refusal to rent or negotiate. HUD v. Pheasant Ridge, HUD ALJ 05-94-0845- 8 (10/25/96), FH-FL Rptr. ¶ 25,123 (Section 8 landlord assessed $50,452 damages for failure to rent to mentally ill siblings).

2. False representation of availability.

3. Discriminatory terms, conditions, services:

o Refusal to allow early lease termination to disabled tenant. Samuelson v. Mid- Atlantic Realty Co. 947 F. Supp. 756 (D.Del. 1996)
-- Higher security deposits. 24 C.F.R. 100.203(a).
-- Discriminatory maintenance or delays in repairs. 24 C.F.R. 65 (b)(2).
-- No children policy. Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984)

4. Eviction:

o Eviction of minorities for late payment of rent discriminatory if landlord has not evicted other tenants who paid late. Khamaja v. Wyatt, 494 F.Supp. 302, 303 (W.D.N.Y. 1980)
-- Whites cannot be evicted for associating with blacks. Woods-Drake v. Lundy, 667 F. 2d 1198, 1201 (5th Cir. 1982); Bill v. Hodges, 628 F.2d 844 (4th Cir. 1980)(§1982 also prohibits such evictions)
-- Eviction because of request to have foster children. Gorski v. Troy, 929 F.2d 1183 (7th Cir. 1991).

5. Steering. Zuch v. Hussey, 394 F. Supp. 1028 (E.D.Mich. 1975), aff'd in relevant part 547 F. 2d 1168 (6th Cir. 1977).

6. Retaliation

7. Coercion, intimidation, threats, interference.

8. Discriminatory advertising.

9. Rehabilitation of housing development. Brown v. Artery Organization, 654 F. Supp. 1106 (D.D.C. 1987).

10. Failure to seek subsidized housing. United States v. City of Parma, 661 F. 2d 562, 575 (6th Cir. 1981) cert. denied 456 U.S. 926.

11. Brokerage services. United States v. Balistrieri, 981 F. 2d 916 (7th Cir. 1992), cert. denied 114 S.Ct. 58 (real estate agent showed black apt. seekers fewer units).

12. Poorer municipal services. Campbell v. City of Berwyn, 815 F. Supp. 1138 (N.D.Ill. 1993); cf. Hawkins v. Town of Shaw, Mississippi, 437 F. 2d 1286 (5th Cir. 1971) aff'd on rehearing en banc 461 F. 2d 1171 (5th Cir. 1972); United Farm Workers of Fla. Housing Project v. City of Delray Beach, 493 F. 2d 799 (5th Cir. 1974); but see Vercher v. Harrisburg Housing Authority, 454 F. Supp. 423 (M.D.Pa. 1978).

E. EXAMPLES OF DISCRIMINATORY PRACTICES

This section provides more examples of specific discriminatory practices by type of discrimination:

1. Familial Status Discrimination

a. Eviction of families of four from two bedroom apartments. HUD v. Denton, FH-FL Rptr. 25,024 (HUD ALJ 1992).
_b. Policy prohibiting one adult/one child in one bedroom and one adult/three children in two bedrooms. Glover v. Crestwood Lake Section 1 Holding Corp., 746 F. Supp. 301 (S.D.N.Y. 1990).

c. Refusal to rent one bedroom apartment to parent and child. HUD v. Properties Unlimited, FH-FL Rptr. 25009 (HUD ALJ 1991).

d. Policy of no more than 4 persons in 3 bedroom unit. Hillcroft Partners v. Cm'n on Human Rights, 205 Conn. 324 (1987).

e. Children of certain ages cannot be banned. HUD v. Edelstein, FH-FL Rptr. 25237-39 (HUD ALJ 1991) aff'd 978 F.2d 1258 (6th Cir. 1992).

f. Limitations based on number of children are illegal. HUD v. Kelly, FH-FL Rptr. 25357-58 (HUD ALJ 1992) aff'd 3 F. 3d 951 (6th Cir. 1993); HUD v. Edelstein, supra. However, ''reasonable'' occupancy standards are allowed.

g. Families with children cannot be segregated within a complex. 24 C.F.R. 100.70 (c)(4).

h. Occupancy restriction of 2 persons per unit. Fair Housing Council v. Ayres, No. SACV 93-149 (C.D.Cal, June 16, 1994), 1994 WL 278535.

i. Increase in rent or security deposit based on number of children. HUD v. Alfaya, No. HUD ALJ 09-89-0766-1.

j. Apartment rule prohibiting children from playing in common areas. 24 C.F.R. 100.65 (b)(4).

k. Rules restricting children from using pool at certain times. HUD v. Lerner, No. HUD ALJ 09-89-1172-1 (7-20-90); HUD v. Paradise Gardens, FH-FL Rptr. 25388-91 (HUD ALJ 1992).

l. Refusal to rent home because of concerns that property would pose danger to children. United States v. Grishman, 818 F. Supp. 21 (D.Me. 1993).

2. Handicap Discrimination

a. Inquiries about handicap or nature/severity. 24 C.F.R. 100.202 (c); Cason v. Rochester Housing Authority, 748 F. Supp. 1002 (W.D.N.Y. 1990)(PHA can't inquire into applicant' ability to live independently).

b. Eviction of mentally ill tenant without making reasonable efforts to accommodate. Roe v. Sugar Mill Associates, 820 F. Supp. 636 (D.N.H. 1993); Citywide Associates v. Renfield, 564 N.E. 2d 1003 (Mass. 1991); but see Housing Authority of the City of Lake Charles v. Pappion, 540 So.2d 567 (La. App. 3d Cir. 1989)(504 case).

c. Eviction for fire hazards without helping tenant get rid of problem. Schuell Investment Co. v. Anderson, 386 N.W. 2d 249 (Minn. App. 1986).

d. Eviction of elderly tenant for poor housekeeping. Cordrey v. Housing Authority of Holyoke, 14 Clearinghouse Rev. 1191 (May 1981).

e. Discriminatory treatment of mentally ill applicants. Doe v. Housing Authority of Pittsburgh, 17 Clearinghouse Rev. 463 (Aug./Sept. 1983).

f. Refusal to rent to disabled tenant unless she signed hold harmless agreement----a requirement not made of the non disabled. HUD v. Community Homes- Western Village, HUD ALJ 10-90-0049-1 (7-10-91).

g. No pets rule as to mentally disabled tenant who needed companionship of dog. Majors v. Housing Authority of the County of Dekalb, Georgia, 652 F. 2d 454 (5th Cir. 1981); Whittier Terrace Associates v. Hampshire, 532 N.E. 2d 712 (Mass. App. 1989).

h. Refusal to waive guest fees for medical care required by handicapped tenant. United States v. California Mobile Home Park Management, No. 92-55568 (9th Cir., July 18, 1994).

i. Refusal to give a disabled coop resident a ground floor parking space. Shapiro v. Cadman Towers, Inc., 51 F. 3d 328 (2d Cir. 1995) (prelim. inj. grt'd).

j. Refusal to allow tenant with emphysema to have an air conditioner. Aegean Investors v. Walker, 27 Clearinghouse Rev. 808 (Nov. 1993).

k. HUD's refusal to transfer disabled Section 8 tenants to housing for the disabled. Lidder v. Cisneros, 823 F.Supp. 164 (S.D.N.Y.) (HUD's motion to dismiss denied).

l. Refusal to rent or negotiate. HUD v. Pheasant Ridge, HUD ALJ 05-94- 0845-8 (10/25/96), FH-FL Rptr. ¶ 25,123 (Section 8 landlord assessed $50,452 damages for failure to rent to mentally ill siblings).

3. Sex Discrimination

a. Refusal to rent to single women or working mothers. Morehead v. Lewis, 432 F. Supp. 674 (N.D.Ill. 1977) aff'd 594 F. 2d 867 (7th Cir. 1979).

b. Discounting woman's income in evaluating family's ability to pay for housing. Normal v. St. Louis Concrete Pipe Co., 447 F. Supp. 624 (E.D.Mo. 1978).

c. Discounting alimony or child support payments. United States v. Reece, 457 F. Supp. 43 (D.Mont. 1978).

d. Sex harassment. United States v. Presidio Investments, Ltd., 4 F. 3d 805 (9th Cir. 1993); Honce v. Vigil, 1 F. 3d 1085 (10th Cir. 1993); Gaellhammer v. Lewallen, 1 FH-FL Rptr. 15472 (N.D. Ohio 1983) aff'd 770 F. 2d 167 (6th Cir. 1985)(couple evicted because wife refused sex with landlord); Chomicki v. Wittekind, 381 N.W.2d 561 (Wis. App. 1985)(female tenant evicted after refusing landlord's demand for sex); Greiger v. Sheets, 689 F. Supp. 835 (N.D.Ill. 1988)(landlord damaged property, refused repairs after female tenant refused sex); Genere v. Massahusetts Cm'n Against Discrimination, 524 N.E.2d 84 (Mass. 1988)(landlord made offensive sexual comments, but never demanded sex or threatened adverse action).

Note: Both ''quid pro quo'' and ''hostile environment'' sexual harassment are actionable.
4. Racial Discrimination

a. Delayed action on minority couple's apartment application. Davis v. Mansards, 597 F. Supp. 334 (N.D.Ind. 1984).

b. Refusal to show available apartments. Bradley v. John M. Brabham Agency, Inc., 463 F. Supp. 27 (D.S.C. 1978).

c. ''Grudging'' sales techniques. United States v. Pelzer Realty Co., Inc., 484 F. 2d 438 (5th Cir. 1973) cert. denied 416 U.S. 936.

d. Showing blacks fewer units, quoting them higher rents and later dates of availability. United States v. Balestrieri, 981 F. 2d 916 (7th Cir. 1992), cert. denied 114 S.Ct. 58.

e. Requirements that minority applicants be approved or recommended by current tenants or other neighbors. Robinson v. 12 Lofts Realty, Inc., 610 F. 2d 1032 (2d Cir. 1979); Grant v. Smith, 574 F. 2d 252 (5th Cir. 1978).

f. Sales person's influence of customer's decision on racial grounds. Zuck v. Hussey, 394 F.Supp. 1028 (E.D. Mich. 1975) aff'd 547 F.2d 1168 (6th Cir. 1977).

g. Refusal to amend zoning ordinance to allow construction of multifamily housing outside of urban renewal area. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.) aff'd per curiam 488 U.S. 45 (1988).

h. Closing private road to black neighbor but allowing whites to use it. Evans v. Tubbe, 657 F.2d 661 (5th Cir 1981).

i. Providing poorer services over time period when white tenants being replaced by black tenants. Concerned Tenants Ass'n v. Indian Trails Apts., 496 F.Supp. 522 (N.D. Ill. 1980).

j. Substandard conditions in housing projects. Durrett v. Housing Authority of the City of Providence, 896 F.2d 600 (1st Cir. 1990).

k. Poorer municipal services for blacks. Campbell v. City of Berwyn, 815 F.Supp. 1138 (N.D. Ill. 1993), cf. United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974).

l. False representation of unavailability. Havens Realty Co. v. Coleman, 455 U.S. 363 (1982).

m. Vandalism of new black resident's property by white neighbor. 42 USC § 3617; Stackhouse v. DeSatter, 620 F.Supp. 208 (N.D. Ill. 1985); see also Sofarelli v. Pinellas Cty., 931 F. 2d 718 (11th Cir. 1991)(neighbors' threats, obscenities, spitting).

n. Intimidation tactics by local resident to discourage Jews from moving into town. LeBlanc-Steinberg v. Fletcher, 781 F.Supp. 261 (S.D.N.Y. 1991).

o. Neighbor's verbal harassment of a Hmong who was inspecting next door house as a prospective tenant. 42 USC § 3617; HUD v. Weber, FH-FL Rpts 25041.

p. Operation of segregated public housing and Section housing programs in metropolitan area. Walker v. HUD, 912 F.2d 819 (5th Cir. 1990).

q. Failure of PHA to locate replacement units in white areas. Christian Community Action, Inc. v. City of New Haven, Clearing-house No. 52,438 (D.Conn. 1999).

r. Refusal of apartment complex to accept Section 8 applicants. Bronson v. Crestwood Lake Apts., 724 F.Supp. 148 (S.D. N.Y. 1989); but see Salute v. Stratford Greens Garden Apts., 136 F. 3d 293 (2d Cir. 1998)(2-1)(FHA not violated by refusal to accept Section 8 tenants).

F. PROCEDURE

1. Jurisdiction

Private plaintiff may bring lawsuit pursuant to 42 USC § 3613 in any appropriate United States district court or state court of general jurisdiction. A federal court may hear related state law claims under supplemental jurisdiction. 28 USC § 1367(a).

2. Statute of Limitations

Private civil actions under 42 USC § 3613 must be filed not later than 2 years after the occurrence or termination of the discriminatory practice. 42 USC 3613(a)(1)(A). Claims under 42 USC §§ 1981 and 1982 are subject to a one year statute of limitations. See Goodman v. Lukens Steel Co., 482 U.S. 656, 660-62 (1987); Bradley v. Carydale Enterprises, 707 F. Supp. 217, 220 (E.D. Va. 1989). Claims under the Louisiana Open Housing Act are subject to a 2 year statute of limitations. La. R.S. 51:2613.

3. Standing to Sue

Standing to sue depends on the substantive law involved. Plaintiffs under the FHA have standing if they are injured in any way by FHA violation and may even assert third party rights. Plaintiffs have been granted standing under the FHA for being deprived of the social and professional benefits of living in an integrated society. Gladstone Realtors v. Village of Bellwood, 441 US 91, 109 (1979).

2. Jury Trials
3.

FHA plaintiffs are entitled to jury trials in federal lawsuits for damages. Curtis v. Loether, 415 U.S. 189, 192 (1974). Jury trials are also available for 42 USC 1981-82 actions. Thronson v. Meisels, 800 F.2d 136 (7th Cir. 1986).

5. Interlocutory Injunction

Rule 65 of the FRCP governs temporary restraining orders. Preliminary injunctions may be consolidated with the trial on the merits. Evidence received at the preliminary injunction becomes part of record and need not be repeated at trial. You should, however, take steps to preserve your jury trial. Discriminatory housing practices constitute irreparable injury. Gresham v. Windrush Partners, Inc., 730 F.2d 1417, 1423-24 (11th Cir. 1984).

6. Rule 68 Offers

Note that Marek v. Chesney, 473 U.S. 1 (1980), may not apply to attorney fees in cases brought under the FHA. Id. at 23-27 (Brennan, J., dissenting).

7. Issue Preclusion

Res judicata and collateral estoppel issues may arise when the landlord has obtained an eviction judgment. In Miller v. Hartwood Apts., 689 F.2d 1239 (5th Cir. 1982), the court held that a Mississippi eviction court judgment did not bar the federal court litigation of a § 1983 claim since these tenants' constitutional claims could not have been litigated in the eviction lawsuit. Note that while tenants' damage claims cannot be litigated in eviction lawsuits, discrimination can be asserted as a defense to possession in Louisiana. Mascaro v. Hudson, 496 So.2d 428 (La. App. 4th Cir. 1986). Thus, it may be

possible that an adverse eviction judgment could bar a plaintiff's equitable claims, but not his damage claims. See e.g., Torres v. Rebarchak, 814 F.2d 1219, 1222-26 (7th Cir. 1987).

To avoid issue preclusion problems, you should file a housing discrimination lawsuit before the landlord files an eviction lawsuit and obtain a state court lis pendens or federal court injunction against any eviction.

G. PROVING A VIOLATION

1. Overview: There are 3 types of claims under the FHA: (1) disparate treatment (2) mixed motive and (3) discriminatory effect. The proof required depends on the type of claim.

2. Disparate Treatment (or Intentional Discrimination)

This claim involves the housing provider treating a protected person differently. The issue is the provider's intent. The provider usually claims that there was a legitimate nondiscriminatory reason for his action. Evidence of discriminatory intent may be either direct or circumstantial.
Cases based on circumstantial evidence are guided by the ''prima facie'' concept. See e.g. HUD ex rel Herron v. Blackwell, 908 F.2d 864, 870-71 (11th Cir. 1990). To establish a prima facie case of disparate treatment, the plaintiff who has been denied housing must show:

(1) he is a member of a protected class
(2) he applied for11 and was qualified to rent/purchase the unit.12
(3) he was rejected by the defendant
(4) the housing opportunity remained available thereafter.13

The defendant must then show a legitimate nondiscriminatory reason for the adverse action. If this burden is met, the plaintiff must show that the legitimate reasons were a ''pretext'' for discrimination. Pretext may be proven with ''testing'' evidence. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

For information on testing services that may be available in your area, contact the Greater New Orleans Fair Housing Action Center, Ph. 504.596.2100, 938 Lafayette St., Suite 413, New Orleans, LA 70113.

3. Mixed Motive Cases

Mixed motive cases involve housing decisions that are based only in part on a prohibited motive. All of the courts of appeals have held that the FHA is violated even if race is just one of the motivating factors. See e.g., Payne v. Bracher, 582 F.2d 17, 18 (5th Cir. 1978). However, it is possible that the Price Waterhouse, 492 U.S. 228, standard could be applied to FHA ''mixed motive'' cases. Price Waterhouse allows a Title VII defendant to win if it could prove that the same decision would have been made if it had not taken race into account. It is unclear whether Price Waterhouse applies to FHA cases. However, there are now ALJ decisions holding that Price Waterhouse does apply to FHA cases. HUD v. Denton, FH-FL Rptr. 25,024 (HUD ALJ 1992).

4. Discriminatory Effects

The courts of appeals have unanimously held that the FHA covers practices that simply produce a discriminating effect. See e.g. United Stated v. Mitchell, 580 F.2d 789, 791-92 (5th Cir. 1978). The

Supreme Court has never ruled on this issue. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.) aff'd 488 U.S. 15 (1988). A good example of a discriminatory effects case is Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984) where a ''no children'' policy was found to have a discriminatory effect on minorities. The key to proving a disparate impact claim is evidence that the defendant's practice has a greater impact on the protected class than others. Proof of a prima facie case of disparate impact shifts the burden to the defendant to justify the challenged practice.

The courts of appeals have stated the defendant's burden differently. Huntington said that there must be legitimate justifications with no less discriminatory alternative available. Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984) held that the defendant must show business necessity. It is, however, possible that defendant could now argue for the Wards Cove (490 U.S. 642) Title VII defense of ''justification that serves its legitimate goals in a significant way.''

Note: Housing discrimination claims based solely on 42 USC 1982 appear to be limited to discriminatory intent cases. Proof is generally governed by the same standards that apply in a FHA case.

H. RELIEF

1. Actual Damages
2.

Tort principles apply to FHA damage suits. Curtis v. Loether, 415 U.S. 189 (1974). Damages vary from the nominal to $500,000 or more. From 1978 to 1988, awards in the range of $5,000 to $25,000 were quite common.

In 1992, the median awards in HUD ALJ cases were:

Race -- $12,022
Family -- 5,953
Handicap -- 5,653
Sex -- 3,930

By comparison the 1992 median award in private FHA cases was $35,000. For a recent discussion of damage awards, see Maximizing Damages in a Fair Housing Case, 26 John Marshall L. Rev. No. 1 (1993). Generally, the major components of actual damages in FHA cases are humiliation, embarrassment and emotional distress.

2. Punitive Damages

The 1988 amendments to the FHA eliminated the $1000 cap for punitive damages. The major Supreme Court case on punitive damages in civil rights cases is Smith v. Wade, 461 U.S. 30 (1983). However, the FHA standard for determining punitive damages is the intentionality of the discrimination. See e.g., City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086 (7th Cir. 1992) cert. denied 113 S.Ct 2965.

3. Equitable Relief

Under § 3613, the court may grant permanent and interlocutory injunctions. The courts are divided over whether the Anti-Injunction Act applies to FHA claims. Compare Casa Marie, Inc. v. Superior Court of

Puerto Rico, 988 F. 2d 252 (1st Cir. 1993) with Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168 (N.D.N.Y. 1993). Given these uncertainties, it may be preferable to sue in state district court when a FHA plaintiff faces a state court summary eviction lawsuit.14 Lis pendens should bar the eviction action and force the litigation of said issues in the housing discrimination lawsuit.

4. Attorney's Fees

The 1988 FHA Amendments strengthened the attorney's fee provision and made it virtually identical to 42 U.S.C. 1988. See 42 U.S.C. 3613(a). Attorney's fees are also available under the Louisiana Open Housing Act. Note, however, that Act 687 of 1999 amended the LOHA to provide attorney's fees to both the prevailing plaintiff and defendant. Although, the sponsors of Act 687 said that their intent was to adopt the same attorney's fees standard as the FHA, it is possible that the courts will use a ''loser pays'' standard rather than the ''frivolous'' standard used in FHA cases.

SECURITY DEPOSITS

A. SUMMARY OF RENT DEPOSIT RETURN ACT

The Rent Deposit Return Act. La. Rev. Stat. 9:3251 et. seq., requires a landlord to return a tenant's deposit, minus any portion which is necessary to remedy a tenant's default, or to remedy unreasonable wear to the premises, within one month of the termination of the lease. If any portion of the deposit is retained, the landlord must furnish the tenant an itemized statement accounting for the retained proceeds and giving the reason therefor, within one month after the tenancy terminates. The tenant must give the landlord a forwarding address to which the itemized statement may be sent. The tenant's commencement of a bankruptcy action automatically stays any right to exercise a setoff of a security deposit against obligations owed by the tenant. 11 U.S.C. § 322 (a)(7). If the landlord transfers his interest in the apartment during the lease term, he must transfer the security deposit to his successor in interest in order to be relieved of further liability with respect to the security deposit.

The statutory mechanism created by La. Rev. Stat. 9:3251 A for the return of security deposits does not apply if the tenant abandons the premises without giving the required notice or abandons it prior to the termination of the lease. La. Rev. Stat. 9:3251 C. Willful failure to comply with the Rent Deposit Return Act subjects the landlord to an additional penalty of $200 (or actual damages if greater) and attorney's fees. La. Rev. Stat. 9:3252 A. Recently, attorney's fees as high as $1,000 have been awarded. Miller v. Ecung, 676 So.2d 656 (La. App. 3d Cir. 1996).

B. PRE-LITIGATION PLANNING

In order to preserve a security deposit claim under La. Rev. Stat. 9:3251, a tenant must give the landlord notice of his intent to terminate the tenancy, as required by the lease or law. The lease (or other agreement) will normally govern the amount and type of notice. Saladino v. Rault Petroleum Corp., 436 So. 2d 714 (La. App. 4th Cir. 1983). In the absence of a lease provision (or other agreement) as to the required notice, Louisiana Civil Code article 2686 requires that the tenant give 10 days written notice of termination prior to the expiration of the current rental month. Thus, as a matter of course, the tenant should be advised to give timely notice of termination in writing and to retain a copy for proof at trial.

In order to maximize leverage for negotiation and litigation of a security deposit claim, a written demand for the refund should always be made on the landlord upon termination of the tenancy. This

demand should include a ‘‘forwarding address’’ to which the landlord’s itemized accounting of the damages and retained security deposit may be sent. The written demand for refund will provide a basis for the court to impose an additional $200 penalty plus attorney’s fees on the landlord if he fails to remit within 30 days after the written demand. La. Rev. Stat. 9:3252-53. Several courts have held that the failure to make a written demand for refund bars the tenant from recovering the $200 penalty and attorney’s fees from the landlord. Maxie v. Juban Lumber Company, 444 So. 2d 181 (La. App. 1st Cir. 1983); Trapani v. Morgan, 426 So. 2d 285 (La. App. 4th Cir. 1983), writ denied 433 So. 2d 165 (La. 1983).

C. MAJOR ISSUES IN LITIGATION

1. Introduction

Most of the substantive issues in security deposit litigation involve the various landlord defenses and whether the tenant is entitled to the additional $200 penalty.

2. Landlord Defenses

a. Adequacy of Tenant’s Notice of Termination

As previously indicated, a tenant must give the landlord timely notice of termination as required by the lease or law. Notice by mail should be sufficient unless otherwise precluded by the lease. Moore v. Drexel Homes, Inc., 293 So. 2d 500 (La. App. 4th Cir. 1974), writ denied 295 So. 2d 812 (La. 1974). Testimony by the tenant (or the mailer), that he personally mailed the notice, postage prepaid, properly addressed, and that the letter was not returned, creates a presumption that the landlord received the notice. See, e.g. Moore, supra at 502-04.

Prior to the enactment of La. Rev. Stat. 9:3251C, an inadequate notice of termination was merely viewed as a breach of a lease obligation. It would not preclude recovery of a security deposit unless the landlord incurred actual damage from such default. See, e.g., Garb v. Clayton-Kent Builders, Inc., 307 So. 2d 813, 814-15 (La. App. 1st Cir. 1975) (failure to give 30 day notice required by lease did not forfeit security deposit). However, the courts generally interpret La. Rev. Stat. 9:3251 C to bar recovery of a security deposit if the tenant did not provide proper notice of termination. Mays v. Alley, 599 So. 2d 459 (La. App. 2d Cir. 1992). Timeliness, form (written vs. oral) and method of service or delivery are the most common grounds for challenging the adequacy of a tenant’s notice of termination. An arguably defective notice of termination may be circumvented in certain circumstances. For example, waiver of a notice requirement or mutual cancellation of the lease, if provable, should remove any La. Rev. Stat. 9:3251C bar to recovery. Cf., Bradwell v. Carter, 299 So. 2d 853 (La. App. 1st Cir. 1974) (waiver of time requirement for notice); Cantelli v. Tonti , 297 So. 2d 766, 768 (La. App. 4th Cir. 1974) (midterm cancellation of lease); Audrey Apartments v. Kornegay, 255 So. 2d 792, 793 (La. App. 4th Cir. 1972); Calix v. Whitson, 306 So. 2d 62, 64 (La. App. 4th Cir. 1974) (subsequent oral agreement to terminate at any time upon notice and payment of pro rata rent); see also La. Civ. Code arts. 1983, 2045-46. Presumably, midterm cancellation of the lease for legal cause, e.g., violation of the warranty of habitability or constructive eviction, would also relieve the tenant from the notice requirements of La. Rev. Stat. 9:3251C. Cf. Nash v. LaFontaine, 407 So. 2d 783 (La. App. 4th Cir. 1981); see also La. Civ. Code art. 2697. La. Rev. Stat. 9:3251C appears to require a forfeiture of the tenant’s security deposit, regardless of the actual damage to the landlord for noncompliance with notice requirements. See, R. Hersbergen, Developments in the Law, 1980-81: Consumer Protection, 42 La. L. Rev. 513, 535 (1982).

Indeed, courts have denied the security deposit where the notice required by the lease was not given. See Mays v. Alley, 599 So. 2d 459 (La. App. 2d Cir. 1992). However, tenants have always had a contractual cause of action, as distinguished from the statutory cause of action created by La. Rev. Stat. 9:3251 et seq., for the return of security deposits. If it can be argued that La. Rev. Stat. 9:3251 does not supersede the tenant's underlying contractual cause of action, then failure to give the landlord proper notice would only render the statutory cause of action under La. Rev. Stat. 9:3251A (and La. Rev. Stat 9:3252) inapplicable and would not bar recovery of the security deposit under the contractual cause of action.

b. Abandonment

Abandonment of the apartment prior to the expiration of the lease may be argued as a defense to a security deposit lawsuit. Hood v. Ashby Partnership, 446 So. 2d 1347 (La. App. 1st Cir. 1984) (court said that the statute simply required a tenant to abide by the lease terms). In Curtis v. Katz, 349 So. 2d 362 (La. App. 4th Cir. 1977), writ denied 351 So. 2d 179 (La. 1977), the court held that living at a new apartment prior to the expiration of the lease did not constitute abandonment where the tenant retained the key, and kept some property at the old apartment until the lease expired. The court defined ''ab-andonment'' as the voluntary relinquishment of the apartment with the intent of terminating possession, and without vesting ownership in any other person. Curtis v. Katz, supra at 363. See also, Preen v. LeRuth, 430 So. 2d 825 (La. App. 5th Cir. 1983). Where a tenant gives the landlord notice of his intention to terminate the lease, but leaves the premises prior to the termination, and fails to pay rent for the remainder of the lease period, the tenant is not entitled to the return of his security deposit. Borne v. Wilander, 509 So. 2d 572 (La. App. 3d Cir. 1987).

c. Rent Due

If the tenant did not vacate by the lease expiration date, the landlord will claim an additional month's rent as an offset on the theory that the lease has reconducted for one month. E.g., Ball v. Fellom, 406 So. 2d 781 (4th Cir. 1981). The landlord would have the burden of proving reconduction in this situation. Talambas v. Louisiana State Bd. of Education, 401 So. 2d 1051 (La. App. 3d Cir. 1981). Occupancy of the apartment for one week or less after the expiration of the lease would not constitute reconduction. Ball v. Fellom, supra; Misse v. Dronet, 493 So. 2d 271 (La. App. 3d Cir. 1986); Baronne Street Ltd. v. Pisano, 526 So. 2d 345 (La. App. 4th Cir. 1988). A tenant's continued occupancy after lease termination would presumably entitle the landlord to the fair market rental value of the actual holdover period under an unjust enrichment theory. The landlord should not be able to claim rent for the period after a tenant vacates the apartment pursuant to an eviction notice. McGrew v. Milford, 255 So. 2d 619 (La. App. 4th Cir. 1971). Landlords also claim an additional month's rent if the tenant does not return the keys prior to the lease expiration date. See. e.g., Simkin v. Vinci, 215 So. 2d 404 (La. App. 4th Cir. 1968).

d. Damages to Premises

A landlord may retain the portion of the security deposit which is reasonably necessary to remedy unreasonable wear to the premises. La. Rev. Stat. 9:3251A; La. Civ. Code art. 2721. The tenant is not responsible for reasonable wear, pre-existing damage, damage that was not his fault, or repairs that are the landlord's responsibility. See generally, Provosty v. Guss, 350 So. 2d 1239 (La. App. 4th Cir. 1977) (tenant not liable for certain cleaning, replastering and painting, a broken cabinet drawer, grease spots on the carpet, and dents in the threshold of the apartment); Lugo v. Vest, 336 So. 2d 972 (La. App. 4th Cir. 1976) (tenant not liable for replacement of a few light bulbs or the patching of a couple of small holes in

the screens). ‘‘Reasonable wear and tear’’ is a factual determination for the trial court. Provosty v. Guss, supra; Lugo v. Vest, supra.

The doctrine of res ipsa loquitur cannot be used to prove that the damage was caused by the tenant’s negligence. Calix v. Whitson, 306 So. 2d 62 (La. App. 4th Cir. 1977). However, the landlord’s proof of damages may include an argument that the tenant is presumed to have received the premises in good condition. La. Civ. Code art. 2720; Bernard Co., Inc. v. Factory Outlet Shoes of New Orleans, Inc., 503 So. 2d 647 (La. App. 4th Cir. 1987). Any presumption created by Civil Code art. 2720 is rebuttable. PACT Barge Co. v. Bayou Const. of Houma, Inc., 357 So. 2d 889 (La. App. 1st Cir. 1978), writ denied 359 So. 2d 628 (La. 1978). Once the landlord has established proof of damage, the tenant has the burden of showing that the damages occurred prior to the commencement of the lease, or occurred without his fault during the lease. Daigle v. Melancon, 442 So. 2d 657 (La. App. 1st Cir. 1983). The burden then shifts back to the landlord to show that the damage was caused by the fault of the tenant. La. Civ. Code art. 2721; Perroncel v. Judge Roy Bean’s Saloon, Inc., 405 So. 2d 626 (La. App. 3d Cir. 1981), rev’d on other grounds 410 So. 2d 745 (La. 1982) (statement of burden of proof specifically upheld by Supreme Court); cf., Speirer v. McIntosh, 342 So. 2d 238 (La. App. 4th Cir. 1977); Diaz v. Edward Levy Metals, Inc., 384 So. 2d 581 (La. App. 4th Cir. 1980) (there must be a showing of some fault on tenant’s part).

3. Adequacy of Landlord’s Itemization

La. Rev. Stat. 9:3251 requires the landlord to provide the tenant with a written itemization of his reasons for retaining any portion of the security deposit. An oral explanation or itemization, will not suffice absent exceptional circumstances such as ‘‘bad faith’’ security deposit litigation. See, Ball v. Fellom, 406 So. 2d 781 (La. App. 4th Cir. 1981); Flynn v. Central Realty of Louisiana Inc., 338 So. 2d 774 (La. App. 4th Cir. 1976) writ denied 341 So. 2d 417 (La. 1977). The landlord’s written itemization must be sent to the tenant or his duly authorized agent. Altazin v. Pirello, 391 So. 2d 1267 (La. App. 1st Cir. 1980). Noncompliance with the written itemization requirement subjects the landlord to the additional $200 penalty and fees. Nwokolo v. Torrey, 726 So.2d 1055 (La. App. 2d Cir. 1999).

A bona fide dispute as to the security deposit, or lease obligations, will not exculpate the landlord from strict compliance with the written itemization requirement. Trapani v. Morgan , 426 So. 2d 285, 291 (La. App. 4th Cir. 1983), writ denied 433 So. 2d 165 (La. 1983); Ball v. Fellom 406 So. 2d 781, 783 (La. App. 4th Cir. 1981); Altazin v. Pirello, 391 So. 2d 1267 (La. App. 1st Cir. 1980).

La. Rev. Stat 9:3251 requires that the landlord’s itemization include (1) an accounting for the retained proceeds and (2) a statement of reasons. O’Brien v. Becker, 332 So. 2d 563 (La. App. 4th Cir. 1976). If the landlord’s itemization is found to lack specificity, there will be a ‘‘willful failure’’ under La. Rev. Stat. 9:3252, and penalties will be appropriate. See, e.g. Woodery v. Smith, 527 So. 2d 389, writ denied 532 So. 2d 178 (La. App. 4th Cir. 1988); O’Brien v. Becker, supra (no itemization, and the receipts, primarily for painting materials, could not be considered ‘‘unusual wear’’ after four years of occupancy); Provosty v. Guss, 350 So. 2d 1239 (La. App. 4th Cir. 1977) (sufficient specificity); Garb v. Clayton-Kent Builders, 307 So. 2d 813 (La. App. 1st Cir. 1975) (landlord’s written statement that he was retaining a tenant’s $50 deposit to ‘‘clean and vacuum the apartment’’ was held to be sufficient). It has been held that an adequate itemization must include a categorical specification which reasonably apprises the tenant of the nature of the elements of wear and tear, separately lists each aspect of wear and tear, and relates the damage to ‘‘unreasonable wear’’. See Woodery v. Smith, supra; Note, 37 La. L. Rev. 458 (1977); but see, Garb v. Clayton-Kent Builders, supra at 815.

Specious or unjustified reasons for retaining a deposit, regardless of their specificity, can never satisfy La. Rev. Stat. 9:3251. Altazin v. Pirello, 391 So. 2d 1267 (La. App. 1st Cir. 1980); Calix v. Whitson, 306 So. 2d 62 (La. App. 4th Cir. 1974).

4. Amount of Tenant's Recovery

A tenant is entitled to his security deposit, and an additional statutory penalty of $200 or actual damages and attorney's fees if the landlord willfully fails to comply with the Rent Deposit Return Act. La. Rev. Stat. 9:3252; see e.g., Cantelli v. Tonti, 297 So. 2d 766, 769 (La. App. 4th Cir. 1974); Nwokolo v. Torrey, supra.

The 1st and 4th Circuits have held that failure to make a written demand for refund bars the tenant from recovering the $200 statutory penalty and attorney's fees. Maxie v. Juban Lumber Company 444 So. 2d 181 (La. App. 1st Cir. 1983); Trapani v. Morgan, 426 So. 2d 285 (La. App. 4th Cir. 1983), writ denied 433 So. 2d 165 (La. 1983). This holding is unsupported by the statutory language of La. Rev. Stat. 9:3252 and contravenes prior jurisprudence. Properly construed, La. Rev. Stat. 9:3252 only creates a conclusive presumption that the landlord's failure to remit after a written demand for a refund, constitutes the ''willful failure'' which triggers the statutory penalty. La. Rev. Stat. 9:3252 conditions the statutory penalty on willful non-compliance with La. Rev. Stat. 9:3251 (duty to return deposit and provide written itemization). It does not limit the statutory penalty to cases where the tenant has made a written demand for a refund. Cf. Ball v. Fellom, 406 So. 2d 781, 783 (La. App. 4th Cir. 1981); Altazin v. Pirello , 391 So. 2d 1267 (La. App. 1st Cir. 1980); Curtis v. Katz, 349 So. 2d 362 (La. App. 4th Cir. 1977), writ denied 351 So. 2d 179 (La. 1977); Provosty v. Guss, 350 So. 2d 1239 (La. App. 4th Cir. 1977). Nonetheless, it would behoove the tenant to make a written demand for refund in order to ensure the landlord's liability for the $200 statutory penalty.

The landlord can be liable for the $200 statutory penalty if his retention of any portion of the security deposit is unjustified. See, e.g., Lugo v. Vest, 336 So. 2d 972 (La. App. 1st Cir. 1976) ($72.30 of $100 deposit withheld for replacement of a few light bulbs and for patching a couple of small holes in the screen). However, in Provosty v. Guss, supra, a landlord who properly retained less than one-third of the security deposit escaped the statutory penalty imposed by La. Rev. Stat. 9:3252. As previously indicated, a landlord who does not provide a timely itemization can be liable for the statutory penalty even if he had a valid dispute as to the amount that is returnable. See, e.g., Altazin v. Pirello , 391 So. 2d 1267 (La. App. 1st Cir. 1980).

D. MISCELLANEOUS PROCEDURAL ISSUES

1. Venue

A security deposit lawsuit may be filed in the parish in which the landlord is domiciled or in the parish where the property is situated. La. Rev. Stat. 9:3252 B.

2. Prescription

Security deposit claims are not governed by any specific prescription statute. Presumably, they are only limited by the 10 year prescriptive period established for claims based on contracts or a personal action. See La. Civ. Code art. 3499.

3. Burden of Proof

A security deposit is the tenant's property. Matter of Universal Sec. and Protection Service, Inc., 223 B.R. 88, 93 (E.D. La. 1998). cf. La. Civ. Code art. 2926; Vermont Real Estate Commission v. Martin, 318 A.2d 670 (Vt. 1974). Therefore, the burden of proof is on the landlord to show cause for the retention of the tenant's deposit (property).

INTERNET RESEARCH

The primary legal services websites for housing advocates are:
Clearinghouse Review
www.povertylaw.org
National Housing Law Project www.nhlp.org
National Consumer Law Center www.consumerlaw.org
Helpful government websites for housing advocates include:
HUD Laws
www.hudclips.org
HUD
www.hud.gov
USDA Rural Housing
www.rurdev.usda.gov
Fair housing cases and information can be found at:
National Fair Housing Advocate
www.fairhousing.com
John Marshall Law School
http://law170.jmls.edu
OTHER TREATISES
G. Armstrong, Louisiana Landlord and Tenant Law
V. Palmer, The Civil Law of Lease in Louisiana
R. Schoshinski, American Law of Landlord and Tenant
J. Relman, Housing Discrimination Practice Manual
R. Schwemm, Housing Discrimination: Law and Litigation
National Housing Law Project, HUD Housing Programs: Tenants' Rights (2d Ed.1994)
National Housing Law Project, RHCDS (FmHA) Housing Programs: Tenants' and Purchaser's Rights (2d Ed.1995)

1
Other possible legal relationships include owner-occupant, innkeeper-guest, employer-employee, owner-trespasser, owners in indivision.
2
The article can be viewed at www.povertylaw.org
3
33 Clearinghouse Rev. 343 (Sept.-Oct. 1999) viewable at www.povertylaw.org.
4
33 Clearinghouse Rev 343 (Sept.-Oct 1999). Case materials can be viewed at www.povertylaw.org. However, note

that the Supreme Court denied a writ application to review the Court of Appeal decision in favor of the tenant.

5
The trial court had set the bond as monthly payments of the contract rent rather than the tenant's rent share.

6
Caveat: you must file the motion for suspensive appeal within 24 hours of rendition of the eviction judgment
in order to preserve the right to appeal suspensively.

7
Pleadings available at www.povertylaw.org.

8
See also, Caulder v. Durham Housing Authority, 433 F. 2d 998 (4th Cir. 1970), cert. denied 401 U.S. 1003
(1971).

9
Caveat: be sure to insist on a signed written judgment if the judge dismisses an eviction lawsuit. A notation
of dismissal is insufficient to support a res judicata plea. Brown v. Boudreaux, 21 So.2d 44 (La. 1945).

10
33 Clearinghouse Rev. 131 (July-Aug.1999). The article can be viewed at www.povertylaw.org.

11
An application may be unnecessary under the futile gesture doctrine. Punchback v. Armistead Homes Group, 907
F.2d 1447 (4th Cir. 1990).

12
Plaintiff should be financially qualified for the unit.

13
Testers can be used to prove this element.

14
Note that a different situation would be presented if you also had a 42 U.S.C. 1983 action against a governmental FHA defendant since a 1983 action is a recognized exception to the Anti-Injunction Act.